SUPREME COURT OF LOUISIANA.

No. 7157.

STATE OF LOUISIANA ex Rel.
SOUTHERN BANK

vs.

E. PILSBURY, Mayor, et als.,
Appellants.

Dissenting Opinion of Chief Justice MANNING.

The following dissenting opinion was delivered by his Honor T. C. MANNING, Chief Justice, on the 30th December, 1878.

I do not concur in the opinion of my brethren, and shall state the reasons of my dissent as briefly as the nature of the case will permit.

The main question is the alleged unconstitutionality of the thirty-seventh section of the act of 1852, as violative of the constitutional requirement that taxation shall be equal and uniform. The argument is that the legislative order to levy a special tax on real estate and slaves (which last may be eliminated from our consideration now,) and not on personalty,

is a prohibited discrimination to the detriment of the former ; and that the levy of any tax on an antiquated assessment, which does not represent the shifting values of a growing and ever-changing city, is illegal, because unequal and not uniform. The relator meets this objection with a denial that the constitutional mandate refers to municipal taxation, and invokes the decisions of this court as supporting and maintaining the doctrine that reference was had to State taxes alone.

The leading case is Duncan's, 2 Annual 182, where the Second Municipality had imposed a special tax of one per centum on all real estate within its limits, and the court said, replying to the objection that it was unconstitutional because in conflict with article 127 of the constitution of 1845 : "That article, by its very terms, applies to State and not to municipal taxes. It provides for the equality and uniformity of taxation throughout the State. * * * * * The framers of this constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses, and their wants ; and their corporate existence is recognized and continued as to certain public rights by an express provision. The jurisprudence under which the present system of taxation had grown up was before them, and the power of remedying the evils of misgovernment was left in *statu quo* with the Legislature, and the convention confined itself to providing for the State government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control."

This judicial declaration is entitled to greater weight, from the fact that the then Chief Justice, who delivered the opinion of the court, was one of the framers of the constitution whose provisions he was expounding. That decision was rendered in 1847, and although it is said that the case originated before the taxation clause of the constitution of 1845 went into full effect, the same court approved and reaffirmed it by name and in express terms in Lafayette vs. Cummins, 3 Annual 674, and Buffington vs. Dinkgrave, 4 Annual 549. These decisions were rendered in 1848 and 1849, and the principle had become a rule of property when the consolidation act of 1852 was passed, and the bonds of the relator were issued. Nor is it unimportant to note in this connection that the courts of Virginia and Arkansas, whose constitutions contained an identical article with ours, ruled in the same way. Gilkerson vs. Frederick, 13 Gratt. 577 ; Washington vs. the State, 13 Ark., 351.

The constitution of 1852 reproduced this requirement touching the equality and uniformity of taxation (article 123), and in 1854 the court, organized under that constitution, had occasion for the first time to construe it. The doctrine of Duncan's case was abandoned, the court being divided in opinion. The Second Municipality had imposed a tax on the owners of real estate contiguous to Benton street, to pay the expense of opening it, and the court said there was no other mode of apportioning a tax for such improvements which will be equal and uniform but that of an *ad valorem* tax on all property holders

within the district, or by paying the expenses out of the funds derived from general taxation, and the tax on the real estate contiguous to the street was held invalid and unconstitutional. There were two dissentients, Slidell, C. J., saying he considered the decision in Duncan's case as settled doctrine, and no longer *res nova*. White's case, 9 Annual 446.

It is now said that the opinion in Duncan's case, so far as it treats of the constitutional mandate of 1845, is *obiter*. Slidell, J., was a member of that court and concurred in the opinion, as did every member of that court, and after seven years of reflection, being also on the new bench, he was unable to discover in what respect it was *obiter*, and not only adhered to it, but declared he did not consider the question any longer an open one.

It was not long, however, before the question was again presented broadly, and one of the two conflicting dicta had to be abandoned. In Yeatman vs. Crandell (11 Annual 220), after quoting the article of the two constitutions, the court say :

" This article refers to State taxation, in its proper sense, for general or State purposes. When it says, that taxation shall be equal and uniform throughout the State, it points directly to its object, which is to regulate the mode of filling the State treasury. It does not take away the power of making local assessments for local improvements. * * * It is notorious that an acre of land pays twice as great a tax for local purposes in one parish as an acre of equal value pays in another parish. Yet no one thinks the constitution infringed by such

a state of things. It is enough that State taxes for State purposes be equal and uniform, and *ad valorem.*"

White's case was thus overruled, and the doctrine of the earlier case was re-affirmed without dissent, one of the justices who formed part of the majority in that case having renounced his former opinion, and saying: "I yield my former impressions on this point, the more readily because the Supreme Court which sat under the constitution of 1845, and five of the seven judges with whom I have sat upon this bench, have concurred in holding that the article in question was not intended to apply to municipal or local taxation for local improvements." The following year, the decision in Yeatman vs. Crandell was reaffirmed in Jamison vs. New Orleans, 12 Annual 346, and again in Wallace vs. Shelton, 14 Annual 498, in which last case the court say: "When the different municipalities were consolidated into one city, the Legislature adopted the principle that it was equal and just that the city at large should pay the very unequal debts of the different municipalities. It was not in the power of this court to say that the legislation was unconstitutional."

There is, therefore, no doubt—there can be none—about the judicial construction of the constitutional requirement of uniformity and equality of taxation. It may be argued that it was an erroneous construction, but that it was the actual construction made by two courts interpreting identical articles in two constitutions has been shown by producing the language of those courts. Nor can it be said that

the question had not proper consideration. It was not settled without controversy, and the circumstances attending the decision of Yeatman's case impart great weight to the manner in which White's case was overruled, and evinced the deliberation which attended the unanimous re-establishment of the earlier doctrine that municipal taxation was not referred to nor included in the constitutional prohibition of inequality of taxation. And if so, then the thirty-seventh section of the act of 1852 is not open to the objection of unconstitutionality made by the defendant, because it deals with municipal taxation alone.

The action of the legislative department of the government, was in accordance with this judicial construction. From the passage of the act of 1852, the requirement for a levy of the tax to pay the interest on the consolidated bonds was complied with. In 1856 the charter of New Orleans was amended and the essential provisions of the act of 1852 were re-enacted, and those touching the levy and collection of this tax were retained, and the assurances of its security and regular payment were renewed. The Common Council were directed to lay an equal and uniform tax upon all property, real and personal, in the city for the purposes of the act —that is to say, for the purpose of providing general revenue, etc.—but said tax *added* to the consolidated loan tax and to certain other specified taxes, shall not exceed in the aggregate one dollar and fifty cents on one hundred dollars of valuation. Sess. Acts 1856, pp. 148, 162, Secs. 42, 117. The manner

of levying the tax for the consolidated loan, as fixed by the thirty-seventh section of the act of 1852, was not interfered with or changed. That tax was to be levied as heretofore, and when added to the general equal and uniform tax which was to be levied on all property for other purposes, the aggregate was not to exceed a specified rate.

There was never a year when this consolidated loan tax was not collected, although the mode of its assessment was altered. In 1870, another charter was granted to New Orleans, and all the rights of the consolidated bondholders, secured to them by previous legislation, were recognized, and the collection of the tax for their payment was provided for. Sess. Acts 1870, pp. 44, 48, Secs. 34, 44. And in 1874, the "validity of the consolidated bonds of New Orleans is recognized in all its integrity" by a solemn legislative declaration. Sess. Acts, p. 92. It was not until 1876, after the annual tax for the payment of the consolidation loan interest had been uninterruptedly laid for *twenty-four* years, that the General Assembly undertook to deprive the holders of the consolidated debt of all the means of procuring or of enforcing payment of their bonds, or the interest upon them.

Meanwhile, in 1875, a suit had been instituted in the United States Circuit Court by holders of the consolidated bonds against the city for the purpose of establishing their debt, and to compel a specific performance of the contract between themselves and the city, which they alleged grew out of and was contained in the thirty-seventh section of the act of

1852. They sought to have their position as creditors first in order, and entitled to preference in payment out of the taxes levied upon lands, determined by a decree of court. The unconstitutionality of the act of 1852 was pleaded by the city, but the Circuit Court affirmed its validity, and declared that the thirty-seventh section constituted a contract between the city and the consolidated bondholders, which could not be impaired, and that the city was liable to those bondholders for the sums collected under it. The decree in that case is pleaded by the relator as *res adjudicata* in this. It is not necessary that I should pass upon that plea, as I am considering the defense as an original question.

In 1876, the act was passed upon which the city relies to justify it in refusing or neglecting to levy the tax required by the act of 1852. Sess. Acts, p. 54. It prohibits the assessment or collection of any tax for the payment of any bonds, or interest of any bonds, except those styled Premium Bonds of the city, and repeals all previous laws which required or authorized the Council to levy any tax for the payment of any other bonds. It deprived the Consolidated Bondholders, by one stroke, of all process for the enforcement of their alleged contract with the city, and annihilated the security which the terms of that contract assured to them. No tax has since been levied to pay the interest on their bonds, or to redeem any portion of them. If the General Assembly had constitutional authority to make that enactment, the relator is remediless. If otherwise, the act of 1852 is binding upon the city.

What was the effect of the act of 1852, *quoad* the consolidated bondholders and the State? Was there a contract made thereby between them, and if yea, can any subsequent legislation invalidate it? There is no distinction between a contract of a State and a contract of an individual, and a contract which a corporation makes under authority of the State is in the same category. The engagement which the city of New Orleans made, was to pay the consolidated bonds, which were to be issued in lieu of the previous obligations of the old city and the three municipalities, and of Lafayette, and she stipulated as security for the performance of this engagement that a certain and specified sum should be raised by taxation each year, to be applied to the payment of the coupons and the partial extinguishment of the principal; and as a further guaranty, the Legislature, in advance, pronounced the nullity of all ordinances, resolutions or other acts which the Council might pass, until the ordinance imposing the consolidation loan tax should have been adopted. This engagement was accepted by those who held the old obligations, and an exchange was effected. Here, then, was a contract made by a public corporation, under express authority of the Legislature, with its creditors, who assented to it by perfecting the arrangement the Legislature had in contemplation. A learned author lays down the rule controlling the rights of these contracting parties, and the obligations resting upon them, thus: "When, under the exercise of powers delegated, the rights of third persons have accrued, and they have assumed the

form of a contract with the municipal corporation, the Legislature cannot change the powers of the corporation so as to impair the rights of its creditors. The Constitution of the United States prohibits any law impairing the obligation of contracts, and while the Legislature may alter or modify the powers of the subdivision of the State, such alteration cannot be allowed to affect the creditors of the subdivisions. They are entitled to claim that the corporation shall exercise such powers as it had at the time their contract was made." Burroughs' Taxation, 427. And, yet more: the rights of these creditors cannot be successfully impugned by the Judiciary any more than by the Legislature; for, the Supreme Court of the United States holds that when the courts of a State have decided that bonds issued by a corporation are valid, if the courts of that State subsequently reverse that decision and declare that the bonds are void, because the Legislature have not the power to authorize their issue, then the rights of the holders of bonds issued during the time when the courts of the State held them valid are not affected by the subsequent adverse ruling that they were invalid. Gelpeke vs. city of Dubuque, 1 Wall. 175; Havemeyer vs. Iowa county, 3 Wall, 294; Lamson's case, 9 Wall. 477.

In Van Hoffman vs. city of Quincy, 4 Wall. 535, the Court say: "It is clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagement, the power of taxation thus given cannot be withdrawn until the

contract is satisfied. The State and the corporation in such cases are equally bound. The power becomes a trust, which the donor cannot annul and which the donee is bound to execute, and neither the State nor the corporation can any more impair the obligation of the contract than any other."

In Smith vs. Appleton, 19 Wis. 495, that court, construing an act very similar to our act of 1852, under which new bonds have been issued to take the place of, and to be received by creditors in the stead of, old bonds, observed that the stringent provisions of the act to secure the payment of the interest "were obviously introduced to induce creditors to surrender their old bonds and accept the new. These provisions, when accepted by the creditors and the city, and the new bonds were issued, constituted a most material element of the new contract. They entered into and became a part of it, and, as such, are not the subject of legislative repeal or amendment, so as to impair the right or diminish the security of the creditors without their assent."

And the same principle applies to this case. In my opinion, the city entered into a contract with the holders of the bonds, the surrender of which she was inviting, which became complete when they exchanged them for consolidated bonds. This contract is contained in the Thirty-seventh section of the act of 1852. The contemporaneous construction of the courts was, that the provisions of that section, relative to taxation upon real estate, was not a violation of the constitutional requirement of uniform and equal

taxation, and therefore the Legislature could not afterwards withdraw the power of taxation thus conferred for the benefit of the bondholders until the contract was satisfied; nor can the judiciary ignore its own previous and contemporaneous exposition and determination of the rights which parties have acquired under the contract to their detriment. The contract cannot be affected by any subsequent decision altering the construction of the law. Gelpeke's case, 1 Wall. 206. "If the contract, when made, was valid by the constitution and laws of the State as *then* expounded by the highest authorities, whose duty was to administer them, no subsequent action of the Legislature or Judiciary can impair its obligation." Havemeyer vs. Iowa county, 3 Wallace 294. Whatever views I may entertain of the soundness or unsoundness of the construction placed by this court upon the articles of the constitutions of 1845 and 1852, relative to equal and uniform taxation, it is sufficient to say here that that question cannot be reopened to the prejudice of the bondholders. Their rights are protected by the adjudications of this court, which, through a long series of decisions (with a single exception,) declared that municipal taxation was not in the contemplation of the constitution when it prescribed the rule of equality and uniformity, and, therefore, the thirty-seventh section of the act of 1852 is a valid enactment. The language of the United States Supreme Court in Van Hoffman's case may be literally applied to this, changing only the date of the act under consideration: "The laws, requiring

taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 " (in our case, the act of 1876), "so far as it affects these bonds, is a nullity. It is the duty of the city to impose and collect the taxes, in all respects, as if that act had not been passed. A different rule would leave nothing of the contract but an abstract right of no practical value, and render the protection of the constitution a shadow and a delusion." 4 Wall. 555.

The inequality of the taxation upon the assessment of 1851 has been very vividly portrayed by the counsel of the city. At that time a large portion of what is now the most beautiful part of the city was unimproved. Streets that then were considered the most desirable locations for the large commercial houses have been surrendered to baser uses. On opposite sides of the same street the operation of the tax was unequal. This inequality has been demonstrated by a tabular statement of one of the counsel for the intervenors, which shows that in the Fourth district the tax is less than one-half that in the Third.

If, however, it was the settled jurisprudence of this State, when the consolidated bonds were issued and received in exchange for old obligations, that the article of the constitution requiring uniform and equal taxation had reference to State taxation alone, the rights of these bondholders cannot be affected by a change of opinion of the judiciary upon that question. Nor can the Legislature disregard, ignore, or

impair the contract which was made between the city and the bondholders. The rights of the bondholders were secured and set forth in the contract. The power of the Legislature to make the provisions which constituted their security was judicially declared to be within the authority of the constitution, and it is too late now to attempt to deprive the bondholders of the guaranty which every department of the government gave them, that they held a just debt, amply secured, and should be paid in the manner stipulated by their debtor.

Petition and Order for Writ of Error.

Filed January 22d, 1879.

UNITED STATES OF AMERICA—STATE OF LOUISIANA—PARISH OF ORLEANS.

State of Louisiana, ex rel., Southern Bank *vs.* Ed. Pilsbury, Mayor, et als. } No. 7157. Supreme Court of the State of Louisiana.

To the Honorable Thomas Courtland Manning, Chief Justice of the Supreme Court of the State of Louisiana:

The petition of the Southern Bank, of the city of New Orleans, State aforesaid, the relator in the suit aforesaid,

Respectfully represents:

That in the above entitled and numbered case, on the docket of the said Court, a final judgment was rendered in favor of the defendants, by the Supreme Court of the State aforesaid, on the thirtieth day of December, 1878, and adversely to the plaintiff;

That the plaintiff in the said case claimed, in the proceedings thereof, a right, title and privilege under the Constitution of the United States, and that this right, title and privilege had been infringed by the defendants in the said cause, under laws of the General Assembly of the State of Louisiana, to the wrong and injury of tne plaintiff and in violation of the Constitution of the United States, and sought relief aocordingly in the said Court;

That the said Supreme Court, in the judgment aforesaid, has denied the existence of the said right, title and privilege, and have decided adversely to the claim of petitioner for relief, to their wrong and injury, and contrary to the Constitution of the United States.

In order that your petitioner may obtain relief in the premises, they pray that your Honor allow a Writ of Error to the Supreme

Court of the United States from the said Court, returnable according to law, to the end that the said judgment may be re-examined and reversed, and that your Honor sign writs to the defendants and the other parties in said suit; viz:

To Isaac W. Patton, now Mayor of the city of New Orleans, vice Edward Pilsbury, late Mayor of said city, whose term of office has expired;

To Alfred H. Isaacson, Administrator of Finance, vice Jules C. Denis, late Administrator of Finance, whose term of office has expired;

To John Glynn, Jr., Administrator of Accounts, vice James G. Brown, late Administrator of Accounts, whose term of office has expired;

To J. Henry Behan, Administrator of Commerce, vice Charles Cavanac, late Administrator of Commerce, whose term of office has expired;

To Washington Marks, Administrator of Assessments, vice John E. Rengstorff, late Administrator of Assessments, whose term of office has expired;

To James D. Houston, Administrator of Improvements, vice John McCaffrey, late Administrator of Improvements, whose term of office has expired;

To Patrick Mealey, Administrator of Police, vice Robert E. Diamond, late Administrator of Police, whose term of office has expired;

To Emile R. Chevalley, Administrator of Water Works and Public Buildings, vice James D. Edwards, late Administrator of Water Works and Public Buildings, whose term of office has expired;

To John J. Weckerling, Jesse K. Bell, Simon Hernsheim, Emile F. Delbondio, Henry Delbondio, Thomas H. Hunt, the State of Louisiana, Hugh W. Montgomery, John R. Clay, and A. R. Clague—ther iungiven, christian, or first, names being unknown to petitioner;

And that your Honor will approve the Bond, herewith submitted, in accordance with the Statutes of the United States,

and do and perform whatever may be required, so that speed justice be done.

JOHN A. CAMPBELL,
E. BERMUDEZ,
Attorneys.

ORDER:—Writ of Error allowed, and Bond approved, as prayed for.

New Orleans, January 22, 1879.

TH. C. MANNING,
[L. S.] *Chief Justice of La.*

BOND FOR WRIT OF ERROR.

Filed January 22d, 1879.

Know all men by these presents, That we, the Southern Bank, as principal, and Thomas Layton and Julian Garr, all of New Orleans, as sureties, are held and firmly bound unto the City of New Orleans and any and all parties in interest, as defendants or intervenors, or others in the suit mentioned in the condition of this bond, in the full and just sum of one thousand dollars ($1000), to be paid to the said City of New Orleans, and all other parties in interest, its or their certain attorney, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 22d day of January, in the year of our Lord, one thousand eight hundred and seventy-nine.

WHEREAS, Lately at a Session of the Supreme Court of Louisiana, held at New Orleans, on the 30th of December, 1878, in a suit depending in said Supreme Court, wherein the State of Louisiana, on the relation of said Southern Bank, was plaintiff, and the said City of New Orleans and others were defendants and intervenors, No. 7157 of the docket of said Court, Judgment was rendered against the said plaintiff, and the

said plaintiff having obtained a writ of Error, and filed a copy thereof in the Clerk's office of the said Supreme Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said parties, defendants and intervenors, and all others concerned, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such, that if the said Southern Bank, plaintiff, shall prosecute said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of

SOUTHERN BANK,

[L.S.] By THOS. LAYTON, President.

THOS. LAYTON, Surety,

Approved: J. GARR, Surety.

THOS. C. MANNING, C. J.

WRIT OF ERROR.

Filed January 22d, 1879.

UNITED STATES OF AMERICA, } ss.
THE PRESIDENT OF THE UNITED STATES, }

To the Honorable the Judges of the Supreme Court of the State of Louisiana, and holding Sessions in the City of New Orleans, Louisiana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in said suit, between the State of Louisiana, on the relation of the Southern Bank, as *plaintiff*, and Edward Pilsbury, Mayor of said City of New Orleans and President of the Council of

said city; Jules C. Denis, Administrator of Finance of said city and member of the Council thereof; James G. Brown, Administrator of Accounts and member of the Council thereof; Charles Cavanac, Administrator of Commerce and member of the Council thereof; John E. Rengstorff, Administrator of Assessments and member of the Council thereof; John McCaffrey, Administrator of Improvements and member of the Council thereof; Robert E. Diamond, Administrator of Police and a member of the Council thereof; James D. Edwards, Administrator of Water Works and Public Buildings and member of said Council, and the City of New Orleans aforesaid, *as defendants;* and John J. Weckerling, Jesse K. Bell, Simon Hernsheim, Emile F. Delbondio, Henry Delbondio, Thomas H. Hunt, Hugh W. Montgomery, John R. Clay, and A. R. Clague, *as intervenors*, said suit bearing No. 7157 of the docket of said Supreme Court, and entitled: State of Louisiana *ex. rel.* Southern Bank vs. E. Pilsbury, Mayor, and others, wherein a title, right and privilege was claimed under the Constitution of the United States, and the decision was against the right, title and privilege, specially set up and claimed in said suit, under such constitution, a manifest error hath happened, to the great damage of the said plaintiff, the State of Louisiana, on the relation of the Southern Bank, as by said plaintiff's complaint, appears;

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 22d day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

[L.S.] F. A. WOOLFLEY,

Clerk of the United States Circuit Court for the Dist. of La.

ACKNOWLEDGEMENT OF SERVICE OF CITATIONS.

Service, of the citations in this cause, acknowledged.

NEW ORLEANS, January 23, 1879.

JNO. & W. S. FINNEY,
Attorneys for Hunt, Intervenor.

KENNARD, HOWE & PRENTISS,
Attorneys for Weckerling, et al., Intervenors.

THOMAS J. SEMMES,
For Montgomery, Clay and Clague.

B. F. JONAS,
For City of New Orleans and for Defendants.

E. W. HUNTINGTON,
For State of Louisiana.

AGREEMENT OF COUNSEL.

Filed January 29, 1879.

State of Louisiana, ex rel., Southern Bank
vs.
Edward Pilsbury, et al.

No. 7157. Supreme Court of the State of Louisiana.

It is agreed that the Transcript to be made on Writ of Error, for the Supreme Court of the United States, will consist of the following:

Petition, affidavit and order thereon; exceptions, answer and supplemental answer and order thereon:

Intervention of Weckerling and others, exclusive of Exhibits annexed; with order thereon;

Intervention of Hunt and order;

Intervention of State of Louisiana and order;

Intervention of Montgomery and order;

Motion and order to strike out part of prayer of petition;

Entry on Minutes, 21st January, 1878;

Evidence offered:

Record Maenhaut vs. City, U. S. C. C;

List of Bonds of Relator;

Ordinances 3130 and 3233, A. S;

Report Consolidated Debt, "B";

Report Bonded Debt;

Statement Personal Property;

Admission, p. 108;

Affidavit of Thomas Layton;

Letters L. and M. (Memorials to Council) and Returns;

Agreement that City Ordinances be considered as offered without being filed;

Plea of Plaintiff to Defendants and Intervenors' appearances;

Record Montgomery Suit;

Agreement dispensing with filing of original bonds, same or any to be used without filing on trial;

Entry Minutes, February 4th, 1878, and submission of case for adjudication;

Reasons for Judgment;

And Judgment;

Motions for New Trial;

Order refusing New Trial;

Motions of Appeal;

Copy of Bonds furnished for Appeal, dispensed;

Answer to Appeal;

Entry on Minutes, Supreme Court, 19, 20, 21, 22, 23, November, 1878;

Reasons for Judgment, Marr., J.;

And Judgment;

Concurring Opinion, DeBlanc., J.;

Dissenting Opinion, Manning., C. J.;

Petition for Writ of Error, Order and Acknowledgment of Citation; Bond and Writ;

It is agreed that the Transcript so made, will be considered complete and sufficient, without prejudice to the right of any of the parties to the suit, to supplement the same by adding any omitted document:

New Orleans, January, 20th, 1879.

JOHN A. CAMPBELL,
E. BERMUDEZ,
Attorneys for Relator.

Without waiver of motion to dismiss, other than for incompleteness of transcript:

B. F. JONAS,
H. C. MILLER,
Attorneys for City of New Orleans and Defendants.
JOHN & W. S. FINNEY,
For Hunt, Intervenor.
THOS. J. SEMMES,
For Intervenors, Montgomery, et al.
KENNARD, HOWE & PRENTISS,
For Intervenors, Weckerling and others.
E. W. HUNTINGTON,
For State of Louisiana.

CLERK'S CERTIFICATE.

SUPREME COURT OF LOUISIANA,

CLERK'S OFFICE, New Orleans. March 14th 1879.

I, ALFRED ROMAN, CLERK of the Supreme Court of the State of Louisiana, the highest Court of Law or Equity of said State in which a decision could be had in the case hereafter mentioned, do hereby *certify* that the foregoing 230 pages contain a true and correct copy of the pleadings, documents and proceedings found in the Transcript, filed in this Court on May 4th, 1878, in the case entitled: *State of Louisiana*, on the relation of the Southern Bank vs. Edward Pilsbury, Mayor, and others, bearing No. 25,072 of the docket of the Third District Court for the Parish of Orleans, from which the said case came, on Appeal, to this Court, and bearing No. 7157 of the docket of this Supreme Court, and that the said copy of pleadings, documents and proceedings, constitute a full and complete transcript of the record of said case under the included written Agreement of Counsel to that effect, in this case, and that the Judgment, on Appeal herein, became final on the 13th January, 1879.

In testimony whereof, I hereunto impress the seal of said Supreme Court of Louisiana, and affix my official signature, at the City of New Orleans, in said State of Louisiana, on this 14th day of March, Eighteen Hundred and Seventy-nine.

Alfd Roman clerk
Supreme Court of Louisiana

(seal)

I, Thomas Courtland Manning, chief justice of the supreme court of the State of Louisiana, do hereby certify that Alfred Roman is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of Alfred Roman to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this 14th day of March, A. D. 1879.

[SEAL.]

TH. C. MANNING,
Chief Justice of Supreme Court of La.

ADDITION TO RECORD 592

1 *Certificate.*

I, Thomas Courtland Manning, chief justice of the supreme court of the State of Louisiana, do hereby certify that Alfred Roman is clerk of the supreme court of the State of Louisiana, holding sessions at the city of New Orleans; that the signature of Alfred Roman to the within certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof I have hereunto set my hand and seal, at the city of New Orleans, this 14th day of March, A. D. 1879.

[SEAL.] TH. C. MANNING,

Chief Justice of Supreme Court of La.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, and holding sessions in the city of New Orleans, Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between the State of Louisiana, on the relation of the Southern Bank, as plaintiff, and Edward Pilsbury, mayor of said city of New Orleans and president of the council of said city; Jules C. Denis, administrator of finance of said city and member of the council thereof; James G. Brown, administrator of accounts and member of the council thereof; Charles Cavanac, administrator of commerce and member of the council thereof; John E. Rengstorff, administrator of assessments and member of the council thereof; John McCaffrey, administrator of improvements and member of the council thereof; Robert E. Diamond, administrator of police and member of the council thereof; James D. Edwards, administrator of water works and public buildings and member of said council, and the city of New Orleans aforesaid, as defendants, and John J. Weckerling, Jesse K. Bell, Simon Hernsheim, Emile F. Delbondio, Henry Delbondio, Thomas H. Hunt, Hugh W. Montgomery, John R. Clay, and A. R. Clague, as intervenors; said suit bearing No. 7157 of the docket of said supreme court and entitled State of Louisiana, ex rel. Southern Bank vs. E. Pilsbury, mayor & als., wherein a right, title, & privilege was claimed under the Constitution of the United States, and the decision was against the right, title, & privilege specially set up and claimed in said suit under such Constitution,

3 a manifest error hath happened, to the great damage of the said plaintiff, the State of Louisiana on the relation of the Southern Bank, as by said plaintiff' complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if

No.

OCTOBER TERM, 1879.

STATE OF LOUISIANA, ON THE RELATION OF THE SOUTHERN BANK,

PLAINTIFF IN ERROR,

vs.

EDWARD PILSBURY, Mayor of New Orleans;
JULES C. DENIS, Administrator of Finance;
JOSEPH G. BREWER, Administrator of Accounts;
CHARLES CAZANAC, Administrator of Commerce;
JOHN E. KENNEDY, Administrator of Assessments;
JOHN McCAFFREY, Administrator of Improvements;
ROBERT S. DIAMOND, Administrator of Police;
JAMES D. EDWARDS, Administrator of Water Works and Public Buildings,

DEFENDANTS IN ERROR,

JOHN J. WECKERLING, [illegible] E. BELL, [illegible]
EUGENE D. DELSONDE, HENRY DELSONDE, THOMAS [illegible]
THE STATE OF LOUISIANA, HUGH W. MONTGOMERY, [illegible]
CLAY, A. M. CLAGUE,

INTERVENORS.

JOHN A. CAMPBELL,
EDWARD BERMUDEZ, } *Attorneys for Relator.*
R. H. HUNT,
H. C. MILLER, } *Attorneys for City of New Orleans and Defendants.*
JOHN & W. M. HUNT, *Attorneys for Hunt, Intervenor.*
THOS. J. SEMMES, *Attorney for Hugh W. Montgomery, et als., Intervenors.*
E. W. HUNTINGTON, *Attorney for State of Louisiana, Intervenor.*
KENNARD, HOWE & PRENTISS,
Attorneys for John J. Weckerling, et als., Intervenors.

Briefs for Plaintiff in Error.

JOHN A. CAMPBELL,
EDWARD BERMUDEZ, } *of Counsel.*

Filed , 1879.



THE STATE OF LOUISIANA ex rel. SOUTHERN BANK

versus

CITY OF NEW ORLEANS.

I.

The City of New Orleans was divided into three separate municipalities, each having corporate powers, and with all the faculties proper for municipal administration, (a distinct treasury and council, and police and system of taxation) in the year 1836.

This disunion continued until 1852, when they were *consolidated* into one city a second time.

Bullard & Curry, Dig. p. 120, 125, § IV, XV.

II.

The act of that year contains provisions which signify a *reunion* might at some time become desirable. There are sections which indicate the terms of such reunion. Among these terms, are provisions for the payment of debts of each municipality by its inhabitants as a condition.

Bull. & C. Dig. p. 128, § XXIV, XXV; p. 129, § III.

III.

The municipalities subsequently became greatly involved

with debt, their credit impaired, and their resources diminished so as to create a necessity for legislative acts to settle and to liquidate their affairs.

One of those legislative acts was enacted in 1847, and another was passed in 1850, and a third is found in the 37th section of the act of 1852 providing for a consolidation of the city.

Session Acts—Act 4th March, 1847, p. 14, No. 102.
Acts 1850, p. 169, No. 169.
Acts 1852, p. 42, No. 71.

The decisions of the Supreme Court reported as,
Board of Liquidators vs. Municipality One, 6 A. 21.
Municipality vs. Steamer Anna, 7 A. p. 149,

refer to the first two of those acts and show that the municipalities were then seeking for respite, and had already fatally encumbered their resources and property. The 37th section of the act of 1852 was the third attempt to obtain respite. This attempt was successful. There was a full settlement of the debt of the municipalities under its provisions. The debts settled amounted to above ten millions of dollars, as will appear from the reports submitted in this cause.

IV.

The creditors of the City of New Orleans, under the terms of that act, surrendered their evidences of debt in exchange for the consolidated stock or bonds, or that stock was sold and the money applied to the payment of the debts of the old city, or the respective municipalities.

These bonds were issued by the City of New Orleans, negotiable, having coupon warrants for semi-annual interest, and are generally due at forty years from the date.

The 37th section provides that they should only be used to pay the debts of the municipalities and old city; that there shall be a tax annually assessed in January of each year, as the primal duty of the corporation, to pay the interest on the bonds, amounting to six hundred and fifty thousand dollars (fifty thousand being required by Act No. 72 on account of the simultaneous annexation of Lafayette), and to pay off some of the principal annually. This tax is to be assessed under a separate ordinance. The money is to be kept apart from other moneys and to be faithfully applied. There was a prohibition upon the creation of other debts and issue of other bonds while this debt is owing, except under severe restrictions.

V.

The relator in this suit claims that the terms of this section having been accepted by a large proportion of the creditors of the city, and the consolidated stock having been issued and having obtained credit because of those terms, that a contract ensued therefrom. They affirm that this is a subsisting contract. That the State of Louisiana has no power to impair its obligation, and that the General Assembly of the State of Louisiana are debarred by the constitution of the United States, and by the constitution of the State itself, from diminishing its obligatory force and operation.

The 37th section of this act contains a proposition to the creditors of the city, as well as to purchasers of the stock described in it, that this stock shall be secured and guaranteed, and that the principal and interest should be annually paid from the resources therein described, and being accepted, these resources are pledged to those creditors and owners of the stock as a vested right.

Maenhaut vs. City of New Orleans, 2 Wood's Rep. 108.

Smith vs. Appleton, 19 Wiscon. 468.

10 California R. 563; 7 Cal. 579.

1 Dill. Mun. Corp., § 41.

Board of Liq. vs. Municipality, 6 La. Ann. 21.

Von Hoffman vs. Quincy, 4 Wall. 535.

Furmon vs. Nicholl, 8 Wall. 44.

Brooklyn Park Co. vs. Armstrong, 45 N. Y. 234.

These authorities substantiate the proposition that an overture, such as is propounded in the 37th Section of the Act of 1853, being accepted, constitutes a commutative contract by which each party is bound to do and receive as it provides, and that there is a right vested to insist upon the performance of its stipulations.

VI.

The defendant, either in the answer or the argument contends there is no obligation to comply with the terms of this act for causes we shall separately examine. And first, that the Legislature could not make the division of the debts of the three municipalities, so that there should be a greater portion of debt and of taxation placed upon one

than upon another. We have shown in article *one* of this brief, that in the Act of 1836, such a power was reserved and such a settlement was provided for. But independently of the sections of the acts passed in 1836, the general law fully authorized this legislation.

The powers of the General Assembly in such cases are fully considered by Dillon.

1 Mun. Corp. Chapt. VIII, §§ 126–7–8.

Laramie Co. vs. Albany Co., II Otto, R. 307.

Cooley. Const. Lim. § 126 ; 29 Ann. 608.

VII.

The defendant contends that the imposition of a tax upon lands and slaves within the municipalities, according to the terms of the Act of 1852, violated the 127th Article of the Constitution of 1845, for the reason that the tax is not uniform and equal throughout the City of New Orleans, and that being unequal in its operation upon the different municipalities, and being limited to lands and slaves that the constitution is violated.

We answer that the constitution declares that taxation shall be " equal and uniform throughout the State That this language applies to taxation for maintainance of State government and administration, and not for taxation imposed by a municipal corporation, as authorized by the State for municipal purposes. We answer that this construction was made and announced by the Supreme Court of the State, not long after that constitution was adopted. That the opinion of the Court was called for by the argu-

ment in the cause, and was pertinent to the issues. That it bears the impress of deliberation and of counsel. That it has been cited as authority in a number of cases, and its argument vindicated and supported, and it has been received as the settled law of the State. This case is

Municipality vs. Duncan, 2 Ann. 182.

This case is cited and approved in

Lafayette vs. Cummings, 3 Ann. 673.

Buffington vs. Dinkgrave, 4 Ann. 472.

Gillespie vs. Police Jury, 5 Ann. 405.

The State vs. Poydras, 9 Ann. 165-8.

Bodelin vs. Lewis, 8 Ann. 472.

The State vs. Lathrop, 10 Ann. 398.

Wallace vs. Shelton, 14 Ann. 498.

The only case where its authority was ever questioned by name, is that of Municipality vs. White, 9 Ann. 446. That case was decided by a court divided. One of the Judges subsequently discarded his opinion, and the opinion itself was overruled by name.

Yeatman vs. Crandell, 11 Ann. 145.

Jamison vs. New Orleans, 12 Ann. 346.

Wallace vs. Shelton, 14 Ann. 498.

The cases cited of Sims vs. Jackson, Parish of Orleans vs. Cochrane, were cases of a police jury tax. In respect to the power of police juries to tax, it is to be noticed that in 1847, Revised Statutes, 2744, the police jury were required to levy a uniform per centum on every species of property, trade or profession on which the State assesses a tax.

Besides the cases already cited, the Supreme Court sustained a tax assessed under the Act of March, 1852, empowering cities and parishes to subscribe for shares in railroad corporations, levied on *lands alone*, to be applied to pay the subscription.

Police Jury vs. McDonogh, 8 Ann. 128.

New Orleans vs. Grailhe, 9 Ann. 563.

New Orleans vs. Romes, 9 Ann. 573.

Parker vs. Scogin, 11 Ann. 629.

VIII.

For further answer to the objection drawn from the article of the Constitution of 1845, No. 127, we say that by the terms of this article the determination of the *subjects* to be taxed is submitted to the Legislature by the words of the article. The article does not require *all property to be taxed*, but says that taxes shall be equal and uniform on the property "which shall be taxed," and that equal taxation shall be levied "on such property as may be taxed." One kind of property may be taxed higher than another kind. Classification is permitted. Upon this the jurisprudence is clear and without contrariety of judgment.

The State vs. Lathrop, 10 Ann. 398.

The State vs. Poydras, 9 Ann. 165–8.

New Orleans vs. Com. Bank, 10 Ann. 736.

Parker vs. Scogin, 11 Ann. 629.

Wallace vs. Shelton, 14 Ann. 434.

State vs. Fosdick, 21 Ann. 434.

Honold vs. New Orleans, 23 Ann. 726.

Whitted vs. Lewis, 25 Ann. 568.

The case of Gilman vs. Sheboygan, reported in 2d Black, 510, relates to constitutions where the taxation is to be uniform, equal, and to embrace all the property within the State.

The decisions require that a constitution with such language operates on *all* property, and embraces every taxation and by every authority.

But this is not the conclusion of the Supreme Court of Louisiana and other States whose constitutions have a scope less comprehensive.

Gilkerson vs. Frederick, 13 Gratt. 577.

Washington vs. the State, 13 Ark. 351.

Burroughs, in his work on taxation, considers whether a State whose constitution provides for equality and uniformity could place the whole burden upon real estate or other species of property. He says the question has not been raised. But that if there was not a clause which prohibited discrimination the legislature could do so. Burrough on Tax, pp. 65, 66.

In Louisiana the constitution provides for eqnality and uniformity only, in respect to State taxation, and permits discrimination and classification of subjects as to State taxation; and the reports show that taxes placed upon real estate and slaves, or real estate alone, have been supported in the Supreme Court.

IX.

The charter of 1852 was accepted by the inhabitants

of New Orleans. The organization of the City of New Orleans under the new charter, took place under a special act passed at the same session (1852).

Act No. 142, p. 111.

The acts dissolving the Board of Liquidation and for delivery of its property to the commissioners appointed in the 37th section, and prohibiting the municipalities from contracting other debts, were likewise passed at the same session.

Acts Nos. 115, 116 of session of 1852.

The adjustment of the debts of the municipalities was a work of time. The largest settlement was made in 1854, and for several years after there were settlements. The tax provided in the 37th section was annually collected, pursuant to the conditions of that act.

In the Supreme Court of the State there are a number of cases where judgments were rendered for the amount of these taxes. No tax payer raised any question of the validity of this tax.

New Orleans vs. Cochrane, 8 Ann. —.

Same vs. Solomon, 10 Ann. 454.

Same vs. Locke, ibid, 730.

Same vs. Cannon, ibid 764.

Same vs. Codeville, ibid, 732.

Same vs. Halpman, 11 Ann. 145.

Richardson vs. Morgan, 16 Ann. 429.

The General Assembly in the year 1856 amended the charter of the city, and re-enacted nearly all of the provisions of the act of 1852.

In that amended charter there are sections making careful recognition of the section 37, and repeating the assurances it contains for security and payment

Act No. 164, p. 136. §§ 40, 42, 117, 118.

This tax was collected accordingly from that date until 1870, a period of 14 years, without opposition or dispute.

The charter of 1870, No. 7. p. 30, of the acts of the called session, provide for the exemption of this stock from taxation; reserve all the rights, trusts and uses with sedulous care; provide for the collection of the tax for the full amount, and provides penalties for any attempt at diversion of the money collected, from the appropriate destination. §§ 34, 44, 50 of charter.

Again, in 1874 (Act. No. 53, p. 92), when the collection of the sinking fund was deferred because of the depression in commerce and of production, this security was again acknowledged as entirely valid.

During this period there had been paid both principal and interest from the moneys raised, amounting to more than half of the principal with all of the interest during that time.

An entire generation of population have thus sanctioned the validity and binding obligation of the settlement contained in the act of 1852, and had been parties to the settlement.

In the year 1875 the city authorities manifested a purpose to disburden themselves of the obligations and duties these statutes had imposed, and to evade the fulfill-

ment of the claims of this class of the creditors of the city. The consequence was, a bill was filed in the Circuit Court of the United States for Louisiana, by certain holders of the bonds on behalf of themselves and all other holders of the stock who might unite with them, against the City of New Orleans, and certain creditors holding subordinate liens. The object of this bill as disclosed by the averments and the prayer, was to establish the debt of the holders of the consolidated stock under the 37th Section of the Act of 1852; to have a specific performance of the contract between the city and themselves, and that their title should be established as first in order and preference upon the taxes levied on lands within the city, by city authorities. The city, after this and during that year, passed an ordinance, the effect of which was to preclude the holders of these bonds from receiving anything for the taxes collected under the provisions of the acts concerning the consolidated stock, unless these holders would relinquish one-half of the amount of the coupons falling due and chargeable upon the said taxes to be used for city purposes. Therefore, a supplemental bill was filed to enjoin the city authorities from attempting to divest the fund and to maintain the claim of the creditors upon it to its full amount, and denying the authority of the corporation to appropriate any part of it. The city was a party defendant and appeared to the bill and answered the same; among other things answered was that there was no obligation or duty to employ the tax for the purpose of paying the coupons on the said bonds, and that

the city was not responsible for the said tax, Upon the hearing of the suit the said city objected that the section of the act was unconstitutional and invalid and the bondholders had no title whereby to call for the said tax, the same being unequal and not uniform. The Court, by its interlocutory and its final decree affirmed the validity of the Act of 1852, and that the Section 37 contained the terms of a contract between the said corporation and the bondholders. That the said corporation was liable to the said bondholders for the sums collected under that section for the objects aforesaid, and that the ordinance perverting the money so collected was contrary to law.

The court in its final decree perpetually enjoined the city from making any use of the monies collected from the taxes that had been previously laid under the Legislative Acts.

The court having established the validity of the contract and the existence of the debt and the distribution of the money, declared that the powers of the Court as a Court of Chancery were exhausted, and that further relief must be had by mandamus to compel the assessment of taxes year by year.

The relator was a party to this bill as plaintiff, and proved its debt before the Master. The rules and practice of the court allowed such a suit to be maintained in that form and with that effect.

Smith vs. Swormstedt, 16 Howard, 288.

West vs Randall, 2 Mason, 181.

Story, Eq. Plead. §§ 97-8-9.

X.

The conditions upon which a res judicata can be pleaded, are, that the parties must be the same to the judgment pleaded. In this suit all the holders of bonds issued under the 37th Section, were parties by representation, and this relator came in. The City of New Orleans was a defendant. The cause of this suit was the alleged breach of the contract contained in the section thirty-seven. There had been a failure to levy the taxes as prescribed by that section for a sinking fund. There had been an attempt to divest the fund collected for interest to another purpose, and payment was withheld; before the suit was ended the Act of 1876 had been passed which is pleaded in this case.

The Court declared that the act of 1852 was valid, operative, binding, and that the money collected must be paid to the bondholders under that contract.

The decisions declare that such a judgment is conclusive as a plea in another suit founded on the same class of securities, in respect of all the matters decided in suit of

Cromwell vs. County of Sac, IV Otto, 351.—Clifford's opinion.

Sickles vs. W. A. G. Steam Co., 24 How. 333.

Parker vs. Scogin, 11 Ann. 629.

Haynes vs. Wall, 13 Ann. 258.

Wells vs. Compton, 3 Rob. 171.

Rake vs. Pope, 7 Ala. R. 257.

4 Merlin Rep., p. 430.

8 Dalloz Jur. Gen. 257.

The cases from the French authors establish that when a creditor sues for the recovery of arrearages o interest upon any evidence of debt, and the debtor denies that the evidence of debt is valid and operative, that a judgment in his favor is conclusive in a suit founded on the evidence of debt for the recovery of the principal, of the validity and binding force of the debt and may be pleaded as *res judicata* to such a defence against the debt.

XI.

Besides these various concurring arguments to sustain the validity of the section thirty-seven, and that it was constitutionally enacted it is to be observed that the General Assembly have repeatedly affirmed at different times and in a different manner its legality; that the City of New Orleans asserted the validity of the section by a long continuous action upon it, and by selling and exchanging their consolidated bonds for obligations which the city had acknowledged; that every owner of bonds paid his taxes year by year under the assessments, and that no one of all of these challenged this settlement; that the bonds have been current in the market, they have been received as security by the State from the free banks, and their validity has been acknowledged in statutes. Under these circumstances, independently of the other potential and overruling arguments, it is not within the competence of the city of New Orleans to deny the validity of that section of the act. The defence is immoral and the corporation is estopped.

Society for Savings vs. City of New London, 29 Conn. 175.

Casey vs. Calli, IV Otto, 680, 672.

Ferguson vs. Landrum, 5 Bush. (Ky.) 230.

Hingham vs. Norfolk, 6 Allen, 353.

Webb vs Herne, Bay. Com. Law Rep., 1 Q. B., 642.

Knox Co. vs. Aspinwall, 21 How. 539.

PART SECOND.

The validity of the contract being established, the inquiry arises whether the obligation has been impaired by any act of the State of Louisiana or the city of New Orleans. In the year 1876, after the opinion had been delivered in the Circuit Court of the United Slates affirming the obligation of the act of 1852, the city of New Orleans procured the passage of the Act No. 31, approved 6th March, 1876.

Acts of 1876, p. 54.

The entire act is a contradiction to the 37th section of the act of 1852. The 7th section of the act of 1876 is complained of by the plaintiff as depriving the holders of the consolidated debt of all the guarantees they had obtained in the contract of 1852.

This seventh section prohibits the assessmeut or collection of any tax for the payment of bonds or interest other than a tax to pay for the current expenses of government, and for the payment of the principal and interest of premium bonds in New Orleans, in 1876, or *any*

year thereafter, and that all the existing laws requiring or authorizing the city council to levy any tax whatsoever, be and the same are repealed; and that it should be incompetent for any Court to mandamus the officers to levy and collect any interest tax other than that provided in that act, or in case of such mandamus by a receiver or otherwise to direct the levy or collection of any such tax.

The statutes repealed are those which directed the city council annually, in January of each year, to assess and to collect a separate tax to be set apart for the payment of the interest on the consolidated stock and the reduction of the principal, and the clause of the thirty-seventh section which prohibited the issue of other bonds and the creation of other debts, except in the manner provided in that act, is also annulled.

The interference with this contract in this act admits of no dispute. The contract contains a distinct pledge of a continuing security which shall be available for payment of the principal and the interest. This security is annihilated, and the courts of justice are inhibited from affording redress. The preamble of the act shows that these violations of the Constitution of the United States and of the Constitution of the State have been superinduced by the city council, and that all this is derisively stated to be for public well-being and the maintenance of public honor. The Supreme Court of this State, in Sabatier vs. Creditors, VI Mart. N. S., 585, furnishes the irresistible and overwhelming condemna-

tion of this lawless act of the Legislature in these words: "The Constitution of the United States prohibits any of the particular States from passing acts which will impair the obligation of a contract. As the obligation here spoken of is the legal and not the moral obligation, it would seem to follow that the obligation of a contract is that *which* the law in force at the time the *contract was made, obliges the party to do or not to do.*

If this be true, the right of each is to obtain a performance of every obligation arising out of the agreement at the period it was entered into. *The remedy is the means given by law to carry it into effect.* The question then, in every case of the kind is, "what are the obligations of one of the parties, because the rights of the other, are ever correspondent to, and co-extensive with the duty imposed on the person with whom he stipulated." We have seen that the contract was, that there should be annually levied a specific tax upon all of the lands of this city, and that tax should be applied. The act of 1876 prohibits that collection and prohibits all judicial proceedings to enforce any collection. The Legislature usurps a judicial power to strike down a contract and assumes to preclude the use of judicial remedies to inquire of its validity.

The case of Sabatier was that of a privilege existing under the Code of 1808, and which, by the repeal of that Code would have been abrogated, but for the constitutional protection. There is a remedial right included in every conception of an obligation of a contract.

Without such a right there would be nothing imperative in the law exacting performance of contracts.

Any State Statute which impairs this remedial right in the case of an existing contract, as truly and as effectually impairs the obligation as though its operation had been directed against the very terms in which the parties had expressed their agreement, The Act of 1876, not content with abrogating the material terms of the contract itself, also withdrew all remedial process for the litigation of the right, or the enforcement of it. Pomeroy, in his constitutional law, p. 398, says: "Included within the general sanctioning, or remedial right which forms part of the obligation of every contract are the following elements, each and all necessary to its efficacy and perfection: (1). the right to bring an action against the defaulting party as soon after the breach as is permitted by the ordinary procedure of the court; (2). the right to obtain judgment or decree as soon and as efficiently as the ordinary proceedings of the Court will permit; (3) the right to enforce this judgment as certainly and promptly as is allowed by the accustomed practice of the Court. State laws interfering with these elements, interfere with the remedial right itself, impair its efficacy and thereby impair the obligation of the contract."

The Act of 1876, at the instance of *the debtor* prohibits the debtor from performing a contract a previous Legislature had authorized and promoted. The Legislature besides said, the Courts shall not relieve the creditor by the ordinary course of judicial proceedings.

The great jurists of this State, as we have seen, in advance of this legislation condemned it.

Sabatier vs. Creditors, 6 Mart. N. S. 585.

Johnson vs. Duncan, 3 Mart. 530.

Bronson vs. Kinzie, 1 How. 311.

Grantly vs. Ewing, 3 How. 707–717.

Maenhaut vs. New Orleans, 2 Woods, 108.

Von Hoffman vs. Quincy, 4 Wall. 535.

Attempts have been made among the States to obstruct, delay or prevent the enforcement of contracts. The State Courts have shown at times a magnanimous devotion to the performance of public duty by restraining legislatures within the limits of the constitution and annulling their exhorbitant acts.

McKinney vs. Carroll, 5 Monroe, 98, also, 102.

Lapsley vs. Brashier, 4 Littell, 53. also 34.

Grayson vs. Lilly, 7 Monroe, 7–12

Pool vs. Young, 7 Monroe, 587.

Lowry vs. Francis, 2 Yerg. 534.

Sturgis vs. Crownshield, 4 Wheat. 122.

II.

The inquiry now comes whether the Legislature can impose upon the judiciary of the State a disqualification to render judgment and justice in favor of a creditor who accepts from a corporation of the State its obligations under the direct sanction of the Legislature, and with a security proffered to the creditor by the State as an inducement for him to take it and who did take it, made a

novation of a valid debt and released the existing securities.

The Constitution of the State requires the courts to be opened to suitors. That each shall have adequate remedy by due process of law for all wrongs, and that there shall be no unreasonable delay.

It protects the obligation of contracts from violation, and vested rights from disseizin.

The Code of Practice contains a description of the writ of mandamus. The object of the writ is to prevent a denial of justice, and it issues in all cases where the law has assigned no relief by ordinary means and where justice requires that there should be some mode of redressing a wrong. It may be directed to corporations to perform their duties.

It will hardly be contended that the obligation contained in the Section 37, can be enforced by any other process then that of mandamus. The Circuit Court of the United States, decided that the comprehensive jurisdiction of a Court of Chancery did not extend to afford a remedy in this very case.

The only remedy is by mandamus, was the opinion and the judgment of that court.

No precedent exists of any compulsory process against a corporation to assess rates or taxes to pay debts, or to discharge other obligations, except by mandamus.

There is no other writ which can be addressed to a corporate body to compel action in the performance of a specific duty which has been intrusted to and imposed on

that body, and none other by which a citizen or a number of citizens, and not the public at large, can employ. The number of precedents for the use of the writ for the purpose for which we ask it, is very great.

It is true that this portion of the Code of Practice has been compiled from the common law, and this speaks favorably for it. The Judges of this State claim they have enlarged its scope.

Hatch vs. City Bank, 1 Rob. 470.

Watts vs. Police Jury, 11 Ann, 141.

Bassett vs. Barbin, 11 Ann. 672.

The Supreme Court of the United States have sanctioned its use in a number of parallel instances.

Board of Com. vs. Aspinwall, 24 How. 376.

Von Hoffman vs. Quincy, 4 Wall. 535.

Riggs vs. Johnson, C., 6 Wall. 166.

Butz vs. City of Muscatine, 8 Wall. 575.

Supervisors vs. United States, 18 W. 73.

It has been as frequently employed among the States.

Commonwealth vs. Pittsburg, 34 Penn. 476.

Columbia vs. King, 13 Florida, 451.

People vs. Bennett, 54 Barb. 48.

Maddox vs. Graham, 2 Met. (Ky.) 56.

Douglass vs. Chatham, 41 Conn. 233.

Paris vs. Turnpike Co., 11 B. Mon. 143.

All of the text writers quoted designate this as the proper and only suitable remedy in a case like that we place before this court; a case where a statute has been passed authorizing and requiring a corporation to levy a

tax of a specific amount, in a specified time, from a specified property, in order to pay principal or interest on a debt acknowledged, and for which this tax was to be levied, collected and set apart for application to that debt.

Burroughs on Tax, p. 453, says: "There is an exception to the rule that judgment must be first obtained before an application for a mandamus will be entertained. It is in the class of cases where, by the statute creating the debt (as in railroad bonds), it is made the duty of certain officers to levy a tax for the purpose of paying such bonds. Here there is a clear legal duty upon the officers to make the levy, and *there is no other remedy for a failure* to perform the duty but a mandamus, and there is no necessity for a judgment to ascertain the amount due." The authorities are numerous to sustain this proposition. Dillon (at section 688), uses language of the same import in describing the law.

High on Extr. Rem., sections 382, 387.

Cooley on Taxation, 524, 525.

The federal Courts, Supreme and Circuit, are limited by the Judiciary Act of 1789, and the Revised Statutes incorporating its provisions, from issuing the writ of mandamus as an original writ. It can only be used, as the Supreme Court of this State uses it, as ancillary to their appellate jurisdiction. The District Courts of this State have a general jurisdiction, and might use it to enforce the performance of this duty. The writ of mandamus is used for the same purpose of compelling officers and corpo-

rations to perform their duty in cases like the one before the Court.

Instances of such use are to be found of enforcing the assessment of county rates, burrough rates, poor rates, assessments by commissioners of lands to reimburse moneys expended upon levees.

Lord Raym., 1479.

Bac. Ab. Tit. Mand. (D).

1 Q. B. R. 287, 616.

Grant on Corp. 490, note.

Tapp. on Mand. 81.

This exposition shows that the city corporation and the Legislature in the adoption of the act of 1876, put the axe at the root of the tree. It is as flagrant a case of wanton and premeditated repudiation as has stained the annals of any State or of any city.

The duty imposed upon the City is a single, well defined and specific duty. We cannot ask for the performance of any other duty than that they contracted to perform. We are limited to the contract. Our petition and our writ must have rested upon the contract or it would not have been well founded.

The State, before the breach of the contract, was authorized to direct the taxes to be levied uniformly, or that the interest should be paid by the citizens generally. The case of Layton vs. New Orleans, 12 Ann. 515, was well decided as between the parties. The corporator (Mrs. Layton), as the Court said, had made no contract with the State on the subject. The State could regulate

the corporators and corporation. The creditors had no room for complaint so long as the special tax was regularly collected and paid over. No Court would have listened to that complaint, unless there was a pecuniary damage to result. The failure was damnum absque injuria so long as the annual sum was duly paid. 7 Wall., 1; St. Louis vs. Shields, 52 Miss.

But the Act of 1876, repeals all of the statutes which during a period of twenty-four years had been adopted in respect to the consolidated debt, and the provisions for its payment. The legislature and the council both decided that a financial system which deferred payments so that instability, uncertainty, the chances and peradventure the fraudulent manipulation of a lottery wheel were to determine who should be paid, and what should be paid, was the best; that the old ideas of exactness, punctuality, and strict honesty, had become obsolete, and were not suited to the fashions of the day, nor to any habits of their own. The powers of the legislature extended to repeal all such acts as did not impair the obligation of a contract. Fortunately for the country such crooked wisdom, denominated by Lord Bacon as cunning, was overruled in advance by the framers of the Federal and State Constitutions. We appeal from these arbitrary and usurping orders, to the constitution as the paramount law, which the legislature and the council were both under a superhuman obligation to respect. The contract made by the State and the City in 1852, constitutes the basis of the claim we make; that act

requires and commands the city authorities at a specific date to assess a tax for a specific sum for the payment of specific obligations which the city issued for a valuable consideration, and bound itself with the consent of the State to discharge in the manner set forth therein. The mandamus we ask for to compel the fulfilment of this contract is the only remedy.

Douglas vs. Chatham, 41 Conn., R.-233.

Burroughs on Tax., 453.

III.

It is with some reluctance that we notice another of the rabble of arguments, to use an expression of Calhoun, which the city council has employed to cover over the iniquity discoverable in the measures it has sanctioned to defeat the obligations of this contract. For the first time this body has ascertained that the title of the act does not disclose the object. This extraordinary revelation is made for the first time now, after a quarter of a century of administration under the Act of 1852. The existence and obligation of the consolidated stock has been recognized in fourteen different legislative acts. The taxes assessed to pay it have been continually laid, until 1876. All the inhabitants who own property here contributed to it. The Courts have rendered a large number of judgments against delinquents. The same form of title has been used as full and expressive in some of the acts relative to the corporation charter. The levity and wickedness of employing such artifices to obstruct the collection

of a debt by a metropolitan city have been exposed with eloquent indignation by the Courts. We cite:

Society for Savings vs. City of New London, 29 Conn., 174.

Grayson vs. Lilly, 7 Monroe, p. 12.

The title of the act is to consolidate the City of New Orleans and to provide for the government and administration of its affairs. To consolidate a city composed of different municipalities we have described as existing, implies an arrangement of the debts owing by the parts. If the consolidating act does not adjust them, there will be confusion and uncertainty. The government and administration of affairs necessarily involves the collection and appropriation of revenue and estate to the payment of debt. When the confederation was converted into a union by the Constitution of the United States, the statesmanship of Alex. Hamilton was invoked to provide for the public debt, the restoration of public credit, and the replenishment of the public treasury. His panacea for a disordered finance, an empty treasury and burdensome debt, is contained in a few lines. He says: "if the maintainance of public credit then be truly so important, the next inquiry which suggests itself is, by what means is it to be effected? The ready answer to which question is by good faith, by a punctual performance of contracts. States, like individuals, who observe their engagements, are respected and trusted; while the reverse is the fate of those who pursue an opposite conduct."

We conclude that the Section 37 of the Charter of 1852

provides for an act necessary in the consolidation of the city—an act necessary and proper in orderly government and administration.

The authorities read for the State reports sanction such a title, and the long acquiescence in the act, and the frequent use of the same title is evidence full and authentic of its sufficiency.

Sedgewick on Stat. and Con. law, p. 518, 2d Ed.

Mayor vs. Devlin, 63 N. Y., R. p. 8.

IV.

The Act of 1870, prohibiting the issue of writs of mandamus against the auditing and disbursing subordinate officers of the city to enforce the payment of city debts by mandamus, without a suit against the city in most of the cases, we can imagine only restored a correct application of the rules respecting that writ. The writ of mandamus is not an ordinary but extraordinary writ, to supply a deficiency of a writ proper for the case. There must be difficulty in order to obtain it. If there be a convenient remedy that writ cannot be used because it is more efficient.

There are cases to which that statute might not be applicable. It is not at all clear that the Statute of 1870 could be applied constitutionally to judgments previously rendered, or that the remedies in use for the collection of such judgments would be supplied by that mentioned in that act.

The State *ex rel.* Wm. Henry v. Mayor, Mss. No. 6696.

Hadfield vs. Mayor, 6 Robert, N. Y. R. 301.

Smith vs. Mayor. 7 Ibid, 190.

South vs. Madison, 15 Wis. 30.

McCauley vs. Brooks, 16 Cal. 11.

But the Act of 1876 of the Louisiana Legislature, smites to the heart the contract made with the holders of the consolidated stock, and also destroys at once the obligation of the contract and shuts all the avenues to the courts and deprives the courts of all of their motive power to afford redress. Jack Cade, assuming that the laws of England should come only from his mouth, and all past records must be burnt, seems to have been the model before their eyes. The constitution and laws under it were regarded as cobwebs to be brushed away with their potential hands. All the authorities we have cited upon the subject concur in establishing that the power of the State is insufficient to impair the contract or materially diminish the remedy. This wholesale destruction only convicts the persons who attempted it of impotent malice and mischief.

The decisions set forth that such a repeal cannot be made by the legislature, and that the courts are not bound by them.

Bronson vs. Kinsie, 1 Howard, 311.

Von Hoffman vs. Quincy, 4 Wall. 535.

Burroughs on Tax. 428.

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V.

It is obvious that the intervenors have no title to ap-

pear in this suit. The City corporation represents all the members of the corporation.

Parker vs. Scogin, 11 Ann. 629.

Haynes vs. Wall, 13 Ann. 258.

An intervention is permitted where the intervenor has a clear, distinct and immediate interest in the judgment to be given—not a consequential or a sentimental interest.

Gasquet vs. Johnson, 1 La. 435.

Jamison vs. Barrow, 24 A. 173.

27 A. 138.

Dalloz says, a third person, whether an individual or company, cannot intervene in a suit between two parties; and present conclusions when he shall have an interest in future, but only when he shall have a direct interest in the special object of contestation. The same author says that an inhabitant of a commune cannot intervene in a suit in which the commune is the party, because of his relation.

The allowance of an intervention by a premium bondholder, because he thinks the payment to him will be jeoparded, would justify all of the creditors of the corporation to appear, and the allowance of one owner of bonds to ventilate his notions of municipal obligations, might convert the court into a mass meeting for the manifestation of popular passions, instead of being a place where justice is judicially dispensed so as to maintain truth.

J. A. CAMPBELL,

for the Plaintiff.

STATE *ex rel.* SOUTHERN BANK

VERSUS

E. PILSBURY, MAYOR, ET AL.

Points and Authorities for Relator.

This is an application for a MANDAMUS to compel the City Council, to levy a special tax, on the real estate, within the City of New Orleans, and, for an INJUNCTION protective of that remedy.

The petition alleges substantially, that the Relator owns a large number of (SIX HUNDRED and odd of $1000, each) Bonds and Coupons, matured and unmatured, issued by the City of New Orleans, under authority of Sec. 37 of Act No. 71 of 1852, as amended by the subsequent Act, *in exchange* of obligations of the three municipalities, once composing it; that by the terms of that section, so enlarged, it was *the duty* of the City Council to levy, annually, in the month of January, the sum of $650,000, to be applied, *first*, to the matured Coupons and *next*, to the purchase of Bonds, with the surplus; that the City Council has failed to levy a tax, for sinking fund purposes from 1874 inclusive, to the present time, and has wilfully omitted to levy any tax for interest purposes, from 1876 to the present time; that the said Body has twice been put in mind of its duty to do so, in December

1876 and in December, 1877, by the Relator for itself and other like Bondholders, and that said Council has refused to do so; that there are no funds in the treasury wherewith to pay the arreared Coupons of the Bonds held by Relator and others, and to redeem the Bonds themselves, as contemplated by the law under which they were issued.

The Relator concludes by praying that a peremptory *mandamus* issue, commanding the City Council to levy a special tax, to meet the matured and unpaid coupons and redeem the Bonds, which should have been taken up since 1874 to this day, and that an *injunction* issue forbidding said Council from performing any act injurious to Relator, unless said tax be previously provided for.

To this demand the Defendants have made two returns, resisting the petition :

1°. Because no *mandamus* can issue against them, in any case; for this: that the law relied on, has been repealed; that the rate of taxation for municipal purposes, has been limited and a prohibition for an increase thereof, enacted; that all laws relative to the issue of a *mandamus*, for the levy of the tax claimed have been abrogated, and that the Court is forbidden to issue the writ sought;

2°. Because, even if a *mandamus* could issue that claimed by the Relator, cannot be allowed, on the ground, that the Section 37 relied on, never was a law, for the double reason : that *its object is not expressed in the title* of the act in which it is embodied, and the tax required is *not equal and uniform*.

Several parties have intervened, some joining the Relator, others the Defendants.

I.

The first question to be examined is double and, as follows:

Has the Relator presented a proper case for a *mandamus*, under the law, as it unquestionably stood, *prior* to the 17th March, 1870?

Have the acts invoked by the Defendants, passed since that date, deprived the Relator of the remedy sought?

The Code of Practice, Art. 829, authorizes the writ to be issued in the name of the State to a Corporation, directing it to perform some certain act, which it is its clear duty to do and which it refuses to accomplish; and Art. 844 provides for the enforcement of a peremptory order, against a recreant corporation.

MOSES on *Mandamus*, p. 126, says, that it is the proper and appropriate remedy, to compel a *Municipal Corporation* to make provision for the payment of interest due upon Bonds issued by it, by the assessment and collection of the necessary taxes; and therefore... the proper officers of such corporations may be compelled by *mandamus* to assess and collect such tax. 34 Penn. S. R. 496; 12 Iowa, 359.

In 6 Am. Law Reg. 620, it is said: That the duty of the City Council to levy and collect the tax to pay the principal and interest of Bonds, is MANDATORY, leaving in the City Council *no discretion*. See also 11 B. Monroe, 154; 2 Met. (Ky.) 56; 28 Miss. (6 Cush.) 38.

"DILLON, on Municipal Corporations, says, No. 685: "*Mandamus* is one of the principal REMEDIES by which "*Municipal* and *public* corporations are compelled to per- "form their duties towards their creditors. The power "of the Legislature over those corporations, is such, that "it may require them to levy a tax, to pay creditors, and "obedience to such requirement, may be enforced by *mandamus*."

34 Pa. 496; 5 Sneed. (Tenn.) 695; 31 N. Y. 164; 37 P. A. 277; 11 A. R. 672; 4 Wall. 535.

The power of municipal corporations, with proper legislative authority, to make contracts and create liabilities cannot be disputed. The consummation of the exercise of such delegated powers, imposes upon them "the duty "of providing for the payment of obligations and liabili- "ties in the special mode prescribed by law."

34 Pa. 510; 37 Pa. 277; 6 Wall. 481; 9 Wall. 409; 32 Pa. 218; 43 Pa. 400; 2 Met. (Ky.) 56; 7 Gray (Mass.) 280; 20 Wis. 87; 8 Wall. 575; 5 Wall. 705; 64 N. Car. 577; 15 Wis. 30; 33 Mo. 44.

COOLEY, on Taxation, p. 524, says:

"One of the *most common cases*, in which the *writ of* "*mandamus* is employed in tax matters, is, where it has "become the clear duty of the *authorities* to levy a tax "for general purposes, or for the payment of some de- "mand, and they refuse to do so..... It is customary "to make express provision by statute, for such cases, "and, *when the statute requires the levy of a tax, the case is* "*clear*..... *If the amount is absolutely fixed*.....the law

" makes it *the duty* of the proper officers to levy a tax for " its payments..... and a *mandamus* may issue, if perform- " ance of the duty is neglected or refused.....It has " been held, that when the Bonds are valid and are to be " paid by the levy of a tax, *an action on the Bonds would* " *not lie*, mandamus being the *appropriate* and also the " *adequate* remedy."

5 Geo. 522; 42 Miss. 237; 20 Md. 449; 3 Con. 358: 27 Mich. 131; 56 Penn. 456; 43 Cal. 353.

24 How. 376; 4 Wall. 435, 535; 5 Wall. 705; 6 Wall. 484, 166, 210, 514; 7 Wall. 313; 9 Wall. 409. 415; 15 Wis. 33; 20 Wis. 79, 87, 501; 22 Wis. 258; 25 Wis. 122; 27 Mich. 131; 17 Iowa 1; 34 Iowa 510; 25 Ind. 486; 50 Ill. 453; 65 N. C. 403, 142, 140, 252; 21 Cal. 668; 33 Mo. 440; 44 Mo. 116; 37 Penn. 277, 290.

2 Bay. 63; 43 Geo. 258; 11 B. Monroe 143; 3 Bush. 144; 10 Wend. 363; 54 Barb. 480; 51 N. Y. 401; 43 Cal. 353; 17 Ala. 527; 64 N. C. 557; 11 Wis. 65, 60, 280; 16 O. 38: 17 O. 608; 13 Fla. 451; 34 Penn. 496; 2 Bissell 408.

27 Mich. 82; 2 Mich. 187; 8 Mich. 372; 5 Mich. 223; 18 Mich. 101; 43 Cal. 353; 4 Kans. 250.

BURROUGHS on Taxation, p. 151, § 144, says:

" When there is no plain and adequate remedy for the " creditors, the courts of common law will issue *a man-* " *damus* to the officers of the Corporation, who are invest- " ed with the power of levying taxes, directing them to " levy a sufficient tax to pay the debt of the creditor.

" *There is an exception to the rule that Judgment must be*

" *first obtained, before an application* for a *mandamus* will be " entertained. It is, in that class of cases where, by the " Statute, creating the debt, as in the case of Bonds in " aid of railroad, it is made the DUTY of certain officers to " levy a tax, for the purpose of paying such Bonds. " Here is a *clear* legal duty upon the officers to make the " levy and *there is no other remedy* for the failure to per- " form such duty but a *mandamus, and there is no necessi-* " *ty for a Judgment to ascertain the amount due.*"

24 How. 376, 60, 280; 12 Iowa 335; 35 Iowa 462; 33 Mo. 440; 37 Penn. 377; 34 Penn. 496; 5 Sneed 695; 11 B. Monroe 154; 2 Met. (Ky.) 36; 20 Wis. 87; 55 N. Y. 180; 13 Fla. 451; 64 N. C. 557, 218; 32 Iowa 498.

DILLION, on Municipal Bonds, p. 56, Sec. 25:

" The proper mode of enforcing or compelling the per- " formance of the duty of levying and collecting taxes, " is by *mandamus* which is an adequate remedy."

XI A. R. 141. Where a police jury illegally refused to assess and collect a tax, a *mandamus* was allowed to compel the levy of the tax.

XI A. R. 672. A *mandamus* lies to compel a Sheriff to levy a special tax.

XIII A. R. 289. A right to be of any value, must be promptly enforced by *mandamus*. Where the slowness of ordinary legal proceedings forms a delay, it becomes a denial of justice. A remedy absolutely useless, or extremely inadequate, is no remedy at all.

The Section 37, as amended, and upon which the

Relator relies and which is embodied *in extenso* in the petition, declares emphatically, that it shall *be the duty* of the Council to levy annually, in the month of January, a special tax of $650,000, to be applied to the payment of the interest fallen due and the redemption of part of the Bonds, *though unmatured*.

It makes it the *absolute* duty of the Council and *specifies* the amount of the tax to be raised. The law is *mandatory* and leaves *no discretion* whatever, to the members of the Council who *must* act, or, be *made* to act, as the law requires.

The evidence and the uncontradicted averments of the petition show, that there are no funds in the City treasury to pay the Coupons and Bonds; that the Council was twice put in mind, to levy the special tax, and that they have failed, nay, *refused* so to do.

The rights of the Relator are then clearly established, and the Court would not hesitate to enforce them, had not the Defendants set up *two* acts of the Legislature, which they claim, forbid the issuing of such *mandamus*.

Act 5 of 1870, Sec. 1, p. 10.

A mere perusal of this act will satisfy the Court that, even if constitutional, it has no application to our case, as we do not seek to draw any money from the City treasury, for two obvious reasons:

First, (and it is sufficient in itself,) because there is *none* to our credit in it, and *second*, because we ask the levy of a tax to raise some for us.

The case of Strauss, 30 A., 78, upon which our

opponents have laid so much stress, has no bearing. The Court remarked that Strauss' claim originated in 1876, *years* after the passage of the act. The Court very wisely further declared, that the Relator, whose claim arose, *after* the passage of the law, was not left without remedy; that, *were it otherwise*, the law would clearly be *unconstitutional*.

Neither has the case of McCauley vs. the Auditor, 27 A. 429, any bearing. The State, *not being suable*, had a right to withdraw, at its pleasure, a privilege which it had exceptionably conceded.

The Defendants next oppose Act 31 of 1876, Sec. 7, p. 56, which reads as follows:

Sec. 7 : Be it enacted, etc., THAT NO TAX FOR THE PAYMENT OF BONDS OR INTEREST ON BONDS OTHER THAN THAT AUTHORIZED BY THE PRECEDING SECTION, SHALL BE LEVIED FOR THE YEAR 1876, OR ANY YEAR OR YEARS THEREAFTER, BY THE CITY OF NEW ORLEANS, AND THAT ALL EXISTING LAWS REQUIRING OR AUTHORIZING THE CITY COUNCIL TO LEVY ANY TAX WHATEVER FOR BONDS OR INTEREST ON BONDS OTHER THAN SAID PREMIUM BONDS BE, AND THE SAME ARE HEREBY REPEALED; AND IT SHALL BE HEREAFTER INCOMPETENT FOR ANY COURT TO MANDAMUS THE OFFICERS OF SAID CITY TO LEVY AND COLLECT ANY INTEREST TAX OTHER THAN THAT PROVIDED FOR IN THIS ACT, OR IN CASE OF SUCH MANDAMUS BY A RECEIVER, OR OTHERWISE TO DIVEST THE LEVYING AND COLLECTION OF ANY SUCH TAX.

We have an *interest* in assailing the constitutionality of that act, and it is *indispensably necessary*, for the determi-

nation of our claim, for a *mandamus*, that the Court do test its constitutionality.

We charge against it:

1°. That its several objects are not expressed in the title of the law which embodies it, and so, it violates Art. 114 of the Constitution of 1868 now in force.

2°. That it seeks to impair the obligation of a contract, binding on the State and the City, and so, violates par. 1 of Sec. 10 of Art. 1 of the Constitution of the United States, and Art. 110 of the Constitution of this State.

3°. That it seeks to divest rested rights, and so, violates Art. 110 of the present State Constitution.

4°. That it seeks to encroach upon the powers of the Judiciary in reference to past cases, and *retroacts* Art. 110, and, so, is unconstitutional.

Art. 114 is to the effect that: "EVERY LAW SHALL EXPRESS ITS OBJECT OR OBJECTS IN ITS TITLE."

A scrutiny of that Section establishes conclusively, that it has *three* distinct, important objects:

1°. To repeal all laws requiring the City Council to levy any tax for any Bond or Coupon issued, prior to the Premium Bonds;

2°. To forbid, *for ever*, the future levy of any tax, for the purpose of any Bond or Coupon other than the tax authorized by that act;

3°. To prohibit Courts from issuing any *mandamus*, for the levy of any tax thereby forbidden to be levied, and from appointing any receiver to levy and collect such tax.

Where is, in that title, the generic word indicative of the existence of the objects of that extraordinary section?

No "*reasonable man*," on reading the title of that act, which is some thirteen lines long, can find in it *any clue whatever* to either of those three objects.

The reasons for which the object is required, by the Constitution, to be expressed in the title, appear from the following authorities:

In 4 A. R. 297, the Court said: EUSTIS, C. J.:

"The condition of our statute law was such at the "time of the formation of the Constitution, (1845) as to "impose on the Convention the necessity of providing, "by the constitution itself for the forms of legislation.

"The title of an act afforded *no clue* to its contents; "important general provisions were found placed in acts "private or local in their operation; provisions concern- "ing *matters of practice* or *judicial proceedings* were some- "times in the same statute, with matters entirely foreign "to them; the result of which was that, on many impor- "tant subjects, the statute law had become almost unin- "telligible, as, those, whose duty it has been to examine, "or to act under it, can well testify. To prevent any "further accumulation to this chaotic mass, was the ob- "ject of the constitutional provision under consideration.

The Legislature, having provided for a revision of the "former statutes, *if those provisions are observed*, by future "Legislatures, this body of our laws, will be preserved in "an intelligible form; otherwise the confusion which "prevails will be continued and increased."

In 5 A. 91, the Court said:

"The object of the 118th Art. of the Constitution was "to make it obligatory on the Legislature, to state the ob- "ject of every law in its title, according to the understand- "ing of *reasonable men*. Had the title of this act (that "under consideration) been generally, for the arrest and "custody of runaway slaves, everything germane, to that "object, would be fairly included under such a title; but "the difficulty is, that the provision of this statute, '*to* "*regulate and define fees*,' appears to exclude the general and sweeping object of the statute itself."

Under that theory, the Court decided, that an act entitled "an act to regulate and define the fees to be paid by owners of runaway slaves, for the taking and confinement of the same," &c.—the custody and management of runaway slaves having been changed from the pre-existing laws,—was unconstitutional, and that all that part of the act, which made the change was consequently *null*.

In 5 A. R., p. 94. An act entitled: an act to give jurisdiction to the District Courts of New Orleans over causes arising under the act of 3d March, 1819, respecting landlords and tenants, was declared unconstitutional, because, the object of it, which was to subject tenants to stringent summary and unusual proceedings, had not been expressed in its title.

In 13 A., p. 433. An act "relative to the payment of expenses incident to the prosecution of criminals," but the object of which was *besides*, to provide for the manner in which fines and forfeitures shall be collected, was held to be unconstitutional.

In 14 A., p. 7. An act "*relative to Pilots*," so far as its object was, to regulate cases of Salvage, was likewise pronounced unconstitutional.

In 23 A. 720. An act entitled: "An act to provide a revenue," &c., and which had for its object to give jurisdiction to the Third District Court in tax cases, was decided to be unconstitutienal; that object not being expressed in the title.

In 26 A. p. 142. An act "To enforce the payment of taxes due the State, &c.," and one of the object of which, is to disqualify, as a witness, a delinquent tax-payer, was declared *unconstitutional*, that object not being expressed in the title. No one, upon reading that title, would imagine that the act contained any provision npon the rules of evidence, or the right to be a witness, in a Court of Justice.

In 26 A., p. 699, a similar ruling was made, on the same point.

In 27 A. 144. The title of an act being: "An act to "extend the area of gas lighting in the City of New "Orleans and to reduce the price now paid by con-"sumers," and the object of the act, being to continue the charter of the New Orleans Gas Light Company until the first of April, 1895,—the Court held the act to be unconstitutional, the extension of the charter of that company not being expressed in the title.

The Court said: "The title is *deceptive* and calculated "to mislead the mind from the true object of the statute. "No member of the General Assembly, at the time the

" Bill was about being passed, on hearing the title read,
" would have supposed, that its object was to obtain from
" the State a grant extending the charter of the New Or-
" leans Gas Light Company for *twenty* years. A member
" who could object to extending the charter, might readily
" consent to a reduction of the price of gas and to the ex-
" tension of the era supplying it."

COOLEY on Const. Lim p. 143, Ch. VI, says on this subject, after reviewing the authorities :

" It may be therefore assumed, as settled, that the pur-
" pose of these provisions was : *first*, to prevent *hodge*
" *podge* or " log rolling " legislation; *second*, to prevent
" surprise or fraud upon the Legislature by means of pro-
" visions in Bills, of which the titles gave no intimation
" and which might therefore be overlooked and carelessly
" and unintentionally adopted, and *third*, to fairly apprize
" the people, through such publication of legislative pro-
" ceedings, as is usually made, of the subjects of legislation
" that are being considered, in order that they may have
" opportunity of being heard thereon, by petition or other-
" wise, if they shall so desire."

In other words : the intent of the Constitution was and is, that, at a glance, on reading the title of a law, a man of ordinary understanding should acquire a fair knowledge of its object, and conceive a general idea of the legislative means, appropriate to accomplish its purpose.

Where is the reasonable man who, upon reading the title of the Act 31 of 1876, wherein the Section 7 invoked is embodied, can say, honestly and impartially,

that it contains *a clue* to the extraordinary, heterogeneous objects which it has in view ?

No one is authorized to presume that a Legislature intends to act in violation of the organic law of the country. No one therefore, could *prima facie*, suppose that the deceptive title in question, could cover an unconstitutional, unjust, iniquitous and infamous enactment, which seeks to impair the obligation of a contract, to divest vested rights, to retroact, to modify the rules of practice and shackle the judicial action of the tribunals of the land.

BUT,—conceding, for argument sake,—that this enactment is not subject to the constitutional objection so raised against it, we say, that it is also unconstitutional, for the reasons: that it *impairs the obligation of a solemn contract, divests vested rights and retroacts;* THREE DISTINCT REASONS.

The Constitution of the United States provides, Art. 1, Sec. 10, par. 1, that "No STATE SHALL PASS ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS."

The State Constitution, Art. 110 of 1868, in force when the Premium Bond law was passed, provides:

No *expost facto*, or *retroactive* law, nor any law impairing the obligation of contracts, shall be passed, nor *vested rights be divested*...

Now, we claim that Section 37 of Act No. 71 of 1852, is *a contract*, between the Bondholders, the City and the State, which cannot be impaired by the City or State, and that the power of *taxation* therein given, by the State

to the City, for the purpose of paying the matured Coupons and retiring the Bonds themselves, forms part of the contract. It reads as follows:

SEC. 37. "*Be it enacted, &c.*, That the debt of the general sinking fund, commonly called the old city debt, and the debts of the three municipalities, whether in the form of Bonds, notes, interest coupons, cash warrants, or any other species of obligation whatever, shall be *assumed and paid* by the City of New Orleans, and said city is hereby *declared liable therefor*. The Mayor, Comptroller and Treasurer and the chairmen of the Finance Committees of the two Boards of the Common Council, shall constitute a commission to be called the Commissioners of the Consolidated Debt of New Orleans; and they shall have power to issue Bonds of the City of New Orleans, having not more than forty years to run, with interest payable at such place, as may be agreed on between said commissioners and the parties to whom the Bonds are issued, in semi-annual coupons, *in exchange for any Bonds*, obligations or debts of the old corporation or of any of the municipalities, whether matured or not, or to sell the new Bonds and apply the proceeds to the payment of the matured debts of the old corporation or of the municipalities, but to no other purpose. The Bonds thus issued shall form a Stock to be called the *Consolidated Debt of New Orleans*. At the time, this act goes into operation, an exact and detailed statement of the indebtedness of the old corporation and of each municipality shall be filed in the office of the Comptroller by the Secretary of the Board of Liquida-

tors and the municipal comptrollers respectively, when the commissioners of the Consolidated Debt shall proceed to divide the debt of the old corporation between the several municipalities in proportion to the assessed value of real estate within the limits of each, according to the State Assessment Roll for 1851. The amount thus apportioned to each, together with its individual indebtedness at the time this Act goes into operation, shall constitute the separate debt of each municipality and shall be known as the debt of municipality No. One, No. Two, No. Three. THE COMMON COUNCIL SHALL ANNUALLY, IN THE MONTH OF JANUARY, PASS AN ORDINANCE TO RAISE THE SUM OF SIX HUNDRED THOUSAND DOLLARS, BY A SPECIAL TAX ON REAL ESTATE, to be called THE CONSOLIDATED LOAN TAX, and the rate per cent. of said tax, in each municipality, shall be in proportion to the indebtedness of each. *All ordinances, resolutions or other acts passed by said Council, after the first day of January in each year, shall be null and void, unless the ordinance imposing the Consolidation Loan Tax, shall have been previously passed.* At the end of each and every year, any surplus of the Consolidated Loan Tax remaining in the treasury, after the payment of all the interest and the expenses of the management of said debt, shall be applied to the purchase, from the lowest bidder, of such Bonds issued under this Act, as have the shortest period to run; and the Common Council shall have the right of rejecting all bids demanding more than the face of the Bonds; for which purpose, public notice shall be given by the Comptroller in the official gazette for thirty days, inviting pro-

posals from Bondholders for the sale, to the City, of the Bonds herein described. From and after the passage of this Act, no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the City of New Orleans or under its authority; nor shall any loan be contracted, unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken in the manner prescribed by the City Council, after ten days proclamation by the Mayor, in the newspaper chosen by the Common Council; and no ordinance creating a debt or loan shall be valid, unless such ordinance shall prescribe ways and means for the punctual discharge at maturity of the capital borrowed or debt incurred; and such ordinances shall not be repealed, until principal and interest of the capital borrowed or the debt incurred are fully paid and discharged."

In the same year, the General Assembly passed an Act supplementary to the Act just mentioned, which was approved on February 23d, 1852, and promulgated as No. 72, the fifth Section whereof reads as follows, viz:

SEC. 5. "*Be it further enacted, etc.*, That the debt of the City of Lafayette shall be assumed and paid by the City of New Orleans, and the said City of New Orleans is hereby declared liable therefor; and the amount of said debt shall be ascertained and its payments provided for, and made in the same manner, as the debt of each municipality of New Orleans is ascertained, and provided for in the Act to which this Act is a supplement; and in

raising annually the Consolidation Loan Tax for the payment of the debt of New Orleans, an additional sum of *Fifty thousand dollars* shall be raised for the purpose of providing for the debt of the City of Lafayette, now added to that of New Orleans, so that the whole amount of the annual levy of taxes for the payment of the debt of New Orleans, shall be *Six hundred and fifty thousand dollars;*"

In furtherance of said Section 37, as amended by said Section 5, of the General Assembly, the City of New Orleans, has issued Bonds according to the tenor of said law, for some TEN MILLIONS OF DOLLARS, in exchange of the Bonds, obligations or debts of the three municipalities, in existence at the time of the adoption of said Acts. for which, said City of New Orleans was liable, and all the Bonds so issued by said City were used for the purposes comtemplated by said Acts.

By the provisions of said Section 37, as amended, the Common Council of said City was *commanded annually in the month of January, to pass an ordinance to raise the sum of six hundred and fifty thousand dollars, by a special tax on real estate, to be called the Consolidated Loan Tax, to be applied* FIRST *to the payment of all the interest of said Bonds and* ANY SURPLUS, *to the purchase, from the lowest bidder, of such bonds, as have the shortest period to run*; and it was provided by said law, that *all ordinances, resolutions or other acts passed by said Council after the first day of January in each year, shall be null and void, unless the ordinance imposing the Consolidated Loan Tax, were previously passed.*

The Bonds so issued, were negotiable securities, and by reason of the restrictions imposed by the act providing for the issue and the clear and comprehensive provisions for the payment of the interest, the gradual reduction of the number, through a sinking fund, the Bonds were negotiated *at and above par value ;* and have been distributed, on the markets of Europe and of the United States, in due course of business, as a secure, permanent and trustworthy investment ; the *Free Banks of the State of Louisana were compelled by law to invest in such Bonds* to secure their circulation, and persons and corporations have invested their moneys in said Bonds, with unfeigned confidence in the terms of said section 37, for the maintenance and enforcement of which the public faith of the State of Louisiana and of the City of New Orleans was solemnly and irrevocably pledged.

Of the Bonds so issued by said City, more than five millions have been retired, and that there are outstanding of Bonds, so issued, more than four millions,—the interest coupons of which maturing in the years 1874, 1875, 1876 and 1877, remain unpaid.

WHAT IS A CONTRACT ?

Our code, which is good law *to us*, says, that it is an agreement by which a person obligates himself to another to give, to do or permit or not to do something, expressed or implied by such agreement. R. C. C. 1761. Besides our laws and jurisprudence, see as concording with it, 3 Ark. 285 ; 13 Conn. 87 ; 18 Gratt, 244 ; 7 Cal. 1 ; 5 R. 185.

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It is not necessary to discuss the question of the capacity of States, to contract between themselves *directly*, or in the same manner or through functionaries, with private individuals or duly organized corporations, as the proposition is so well established since the Dartmouth College case, that it admits of no doubt. 4 Wheat. 519; 8 Wheat. 1; 5 Pet. 457; 3 How. 151, 720; 12 How. 293; 15 How. 518.

There is no distinction between a contract by a State and one by an individual. 6 Cranch, 87; 10 Conn. 22; 8 Wheat. 1; 9 Cranch, 43, 292; 7 Cranch, 164; 3 Ark. 285; 13 Conn. 87; 3 McL. 107; 10 How. 190; 8 Ark. 236.

In the leading case on the subject, in which the Legislature of Georgia, had made a grant of lands, which was afterwards rescinded by a subsequent Legislature, Chief Justice MARSHALL, after discussing the question and recognizing a valid contract, pronounced the rescission act unconstitutional. 6 Cranch, 133. This decision has been repeatedly followed.

7 Cranch, 164; 9 Cranch, 43; 16 Cal. 189; 18 Cal. 590; 1 Pick. 224; 2 Yerg. 534; 2 Hayer, 310; 2 Black, 440, and many others.

A contract, having once been entered into, it cannot be impaired, whether formed between States, between a State and individuals or between individuals.

"The obligation of a contract, says Cooley on Const. "Lim., p. 285, consists in its binding force on the party "who makes it. *This depends upon the laws in existence*

" *when it is made.* They are necessarily referred to and " form part of the contract, as the measure of the obliga- " tion, to perform by the one party and the right acquir- " ed by the other. There can be no other standard, by " which to ascertain the extent of either, than that, " which the terms of the contract indicate according to " their *settled* meaning. When it becomes consummated, " the law defines the duty, and the right compels one " party to perform the thing contracted for, and gives to " the other, *a right* to inforce the performance, by the " *remedies then in force.* If any subsequent law affect to " diminish the duty or to impair the right, it necessarily " bears on the obligation of the contract in favor of one " party to the injury of the other. Hence any law which " in its operations, amounts to a denial or obstruction of " the rights accruing by a contract, *though professing to* " *act only on the remedy, is directly obnoxious to the provis-* " *ion of the constitution.*" 1, How. 311; 17 Pet. 28; 2 How. 612; 12 Wheat. 259, 302, 318; 9 Wis. 577; 3 Met. (Ky.) 566; 10 How. 206, 15 How. 304; 24 How. 401; 15 Wis. 36; 19 Wis. 468; 2 Wal. 10; 2 Black. 448; 12 Wheat. 213; 9 Cal. 81; 39 Ala. 353; 14 Rich. 148; 31 Penn. 175; 4 Wheat. 122; 1 How. 311; 2 How. 608; 4 Litt. 34, 47; 16 Wall. 314; 43 Geo. 537.

Burroughs, on Taxation, says, p. 427:

" When, under the exercise of powers delegated, the " rights of third persons have accrued and they have " the form of a contract, with the municipal corporation, " the Legislature cannot change the powers of the corpor-

" ation, so as to impair the rights of the creditors of the " corporation.

" The Constiution of the United States prohibits any " law impairing the obligation of contracts, and, while " the Legislature may alter or modify the powers of the " subdivisions of the State, such alteration cannot be " allowed to affect the creditors of the subdivisions. " They are entitled to claim that the corporation shall " exercise such powers *as it had at the time* their contract " was made,"

4 Wall. 535; 9 Wall. 477; 25 Wis. 122; 31 Penn. 175; 51 Ill. 147, and many others.

" One of the cases cited is where, after the subscription " and issue of the Bonds, the rate of taxation by the cor- " poration was limited. In such cases, the limitation " does not affect the creditor to have a levy made to pay " his debt, although it may be necessary to exceed the " limit. *The operation of the act is retrospective*, and it " cannot be construed retrospectively, so as to deprive the " creditor of the right of levy *as it existed when the con- " tract was made.*"

See also 45 N. Y. 234; 6 Kansas, 256; 25 Cal. 638.

The same author continues:

" The rights of creditors are not only protected from " changes made by the Legislature in the powers of the " corporation, but the Supreme Court of the United " States have extended the principal, so, that, when the " Courts of a State have decided that Bonds issued by " corporations are valid, if the Courts of that State, sub-

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1 Wall. 175, 206, 384; 3 W. 294; 7 W. 55. 477; 2 Otto 683; 16 How. 432; 9 Wall. 477; 4 Wall. 598.

Sedgwick, on Constitutional Law, p. 619, says;

"The Supreme Court of the United States has said "that the contracts to be protected by the tenth Section "of the first article are contracts by which perfect rights, "certain, definite, fixed, private rights of property are "vested as distinguished from rights growing out of "measures or engagements, adopted or undertaken by the "body politic or State Government, for the benefit of all "and which, from the necessity of the case, and accord-"ing to universal understanding, are to be varied, or dis-"continued as the pnblic good shall require;" 10 How. 416; and that the terms of the clause include as well executory, as *executed contracts*. 6. Cranch, 137.

In Wales vs. Stetson, 2 Mass. 146, Parsons C. J. said that rights legally vested, cannot be controlled or destroyed by any subsequent statute.

That a legislature can no more impair its contracts, than a donor his gift. when delivered and accepted, is now considered well and firmly set[1]

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That a legislature can no more impair its contracts, than a donor his gift. when delivered and accepted, is now considered well and firmly settled.

7 Conn. 44; 10 Conn. 5 41; 17 Johnson, 215; 4 Wall. 535.

The substance of the provision is that no State shall interfere in any way with the rights which citizens acquire by contract. A *State Constitution* is but a higher grade of State law than that passed by the *Legislature*. A *State convention has no more power to impair the obligation of contracts than a Legislature*. A *State Constitution, equally with a statute*, is within the Constitutional provision. 15 Rich. 84; 23 Gratt. 266; 4 C. L. N. 123; 9 Yerg. 490; 15 Wall. 610; 1 Sneed. 115; 19 Ind. 407; 21 N. Y. 9; 13 Fla. 417; 1 Woods, 463; 24 Ark. 286; 25 Ark. 625; 4 Kans. 379, 435.

When the Legislature of Arkansas chartered a Bank, the whole of the capital of which, belonged to the State, and declared that the Bills and Notes of the Institution should be received in payment of debts due to the State, it was held that the undertaking of the State to receive the notes of the Bank, constituted a contract, between the State and the holders of these notes, which the State was not at liberty to break.

8 Wheaton 1; 1 Yerger. (Tenn.) 360. See further, *Sedgwick*, p. 639 et seq.

See Pomeroy on Const. Law, p. 398; also, 6 Martin, N. S. 585; also 23 Gratt. 833.

In the celebrated case of VAN HOFFMAN VS. THE CITY OF QUINCY, 4 WALL, 535, which has since been affirmed and adopted as a correct ruling by the Courts of the country, and which is a case almost alike, in every respect, to the

present one, the Court held, on an attempt on the part of the Legislature to prohibit the levy of a tax for the purpose of Bonds and Coupons issued by a Municipal Corporation with the authority of the State, that the act so passed, was unconstitutional, and that the tax should be levied and that a *mandamus* would lie, to compel the raising of the same.

The Court reviews Fletcher vs. Peck, 6 Cranch, 87; New Jersey vs. Wilson, 7 Cranch, 164; Ferret vs. Taylor, 9 Cranch, 43; Green vs. Bidle, 8 Wheat. 92; Brownson vs. Kinzie, 1 How. 319; McCracken vs. Hayward, 2 How. 612; People vs. Bond, 10 Cal. 570; Ogden vs. Saunders, 12 Wheat. 231; Sturges vs. Crowninshield, 4, Wheat, 122; Wheat. 257, recognizes the correctness of the principles therein established, expresses additional views corroborating and reinforcing those cases, and finally concludes, saying: SWAYNE J.:

"*When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes, sufficient in amount to meet the interest, as it accrued, from time to time, upon the entire debt. But for the act of 1863, there would be no difficulty in enforcing them. The amount permitted to be collected, by that act, will be insufficient and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency, the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled.* A RIGHT WITHOUT A REMEDY, IS, AS IF IT WERE NOT. *For every beneficial purposes, it may be said not to exist.*"

"IT IS WELL SETTLED, THAT A STATE MAY DISABLE ITSELF FROM EXERCISING ITS TAXING POWER IN PARTICULAR CASES—7 CRANCH, 166; 18 HOW. 331; 16 HOW. 331.

"IT IS EQUALLY CLEAR THAT, WHERE A STATE HAS AUTHORIZED A MTNICIPAL CORPORATION TO CONTRACT AND TO EXERCISE THE POWER OF LOCAL TAXATION, TO THE EXTENT NECESSARY TO MEET ITS ENGAGEMENT; THE POWER OF TAXATION THUS GIVEN CANNOT BE WITHDRAWN UNTIL THE CONTRACT IS SATISFIED. THE STATE AND THE CORPORATION, IN SUCH CASES, ARE EQUALLY BOUND. THE POWER GIVEN BECOMES A TBUST, WHICH THE DONOR CANNOT ANNUL AND WHICH THE DONEE IS BOUND TO EXECUTE, AND NEITHER, THE STATE, NOR THE CORPORATION, CAN ANY MORE IMPAIR THE OBLIGATION OF THE CONTBACT THAN IN ANY OTHER.

10 Cal. 570; 3 Sandford, 555. (Also, 1 Mo., 164.)

"THE LAWS REQUIRING TAXES TO THE REQUISITE AMOUNT TO BE COLLECTED IN FORCE WHEN THE BONDS WERE ISSUED, ARE STILL IN FORCE FOR ALL THE PURPOSES OF THIS CASE. THE ACT OF 1863, IS, SO FAR AS IT AFFECTS THESE BONDS, A NULLITY. IT IS THE DUTY OF THE CITY, TO IMPOSE AND COLLECT THE TAXES, IN ALL RESPECTS, AS IF THAT ACT HAD NOT BEEN PASSED. A DIFFERENT RULE WOULD LEAVE NOTHING OF THE CONTRACT, BUT AN ABSTRACT RIGHT OF NO PRACTICAL VALUE AND RENDER THE PROTECTION OF THE CONSTITUTION A SHADOW AND A DELUSION.

"The Circuit Court erred in overruling the application for a *mandamus*. (Also, 3 Otto, 266, 271.)

"The judgment of the Lower Court is reversed, and the cause will be remanded with instructions to proceed."

On the question of alienation of the power of taxation, see Scotland vs. M. J. & N. R. R. Co., Supreme Court of Mo., in April 1877, which is to the effect that the taxing power may be alienated where there is no constitutional

provision inhibiting it. Rights vested under a special charter are not divested by provisions in a constitution subsequently adopted. See § 66, p. 109.

It is unquestionable that a legislature can by special legislation bind and control a subsequent legislature. 22 Gratt. 833; 16 How. 416; 1 Ohio, 563; 19 Ark. 360; 2 Houst. 99; 16 Wall. 244; 13 Wall. 264; 15 Wall. 460; 1 Black. 436; 9 Ohio, 606; 7 Mich. 84; 5 Ohio, 361; 17 Ill. 291; 5 Ill. 303; 18 How. 380; 1 Ohio, 591; 18 N. J. 71; 31 Ala. 91; 7 Ohio, 125; 5 Ohio, 444, 447; 11 Ind. 139; 17 N. J. 81; 21 N. J. 557; 5 La. A. R. 394; 18 How. 331, 384; 7 Dana, 338; 30 Penn. 9; 3 Ohio, 586; 1 Ohio, 622; 3 Ohio, 1, 578; 7 Ohio, 48.

The following case is entitled to special attention, not only because it recognizes a contract as existing between Bondholders and the city that issued the bonds, but also because, it does so to the extent, that—as under the stringent provision of the law, under which the securities were uttered, the Council was prohibited from thereafter issuing any other bonds, and injunction would lie to prevent the issue of such prohibited Bonds.

The Supreme Court of Wisconsin said Smith vs. Appleton, 19 Wis., 495–6: "By the sixth section of the Act, "the City Council were prohibited from issuing the Bonds "of the city thereafter for any other purpose whatever, "except the payment of the bonded debt of the city. It "will be seen by reference to the whole Act, that it is "drawn with great care and caution, and most stringent "provisions made for the purpose of securing the prompt

"and sure payment of the new Bonds and coupons to be "issued under it,—among those provisions, is that con- "tained in section six. *They were obviously introduced to* "*induce creditors to surrender their old Bonds and accept* "*the new.* That found in section six, is a *most important* "and *material* one, insuring, as it were, the continued "ability of the city to meet and discharge the Bonds and "interest." *When accepted by the creditors and the city, and the new bonds issued, it constituted a most material element of the* NEW CONTRACT. It entered into and became a part of it, and, as such, is not the subject of legislative repeal or amendment, so as to impair the right or diminish the security of the creditors, without their assent." For cases fully in point, 7 Cal., 579; 10 Cal., 563; 32 Barb., 358; 14 Cal., 9; 17 Wis., 567.

In the case of Maenhaut vs. New Orleans, 2 Woods, 108, the Court said:

"There can be no serious doubt that so much of the 37th "section of the Act of 1852 as provides for *the manner* "*in which the tax to pay the Consolidated Bonds, is to be* "*levied*, and the *safeguards for the levy* and *collection of* "*the tax* constitutes a CONTRACT with the Bondholders, the "substantial performance of which they are entitled to "exact.

"The 37th section of the Act of 1852, constituting, as "it does, A CONTRACT, between the city and the Bond- "holders, stands *unaffected, by any subsequent* legislation "that seeks to impair or repeal its provisions.

"But the *remedy* of the complainants to enforce their

" contract is clearly,... by the writ of *mandamus*, command-
" ing the levy and collection of the tax required by law.
" The remedy at law, is plain, adequate and complete ..."

One of the tests, *that* a contract has been impaired, is that its value has by legislation, been diminished. 6 How. 303; 12 Miss. 28, S. C.; 4 Litt. 47; 3 Wash. 313; 5 Hall. L. J. 502; 11 Mo. 344; 6 How. 507; 16 Cal. 11; 9 Cal. 81; 1 Car. L. R. 385; 7 Mon. 587; 1 Sneed. 548.

A contract is not to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. 6 How 301; 12 Miss. 28; 16 Wall. 314; 43 Geo. 547; 8 Wheat. 1; 13 Mass. 1; 2 How. 608; 12 Miss. 439; 10 Geo. 190; 10 Cal. 563; 14 Miss. 513.

The section opposed to us, viz: section 7 of Act 31 of 1876, which surely was brooded over, by the enemies of public credit, may be said to have been smuggled through by means of a deceptive title, couched in so *insidious* terms as to keep in the dark, as well indifferent or careless members of the Legislature, as the Executive, and parties sought to be injured by this clandestine, mischievous, scandalous and shameful provision. It is believed that the Bill was not adopted legally, because, in violation of constitutional rules.

It not only seeks to *impair* the obligation of a solemn contract, not only to *alter the remedies* in force at the time of the formation of the contract, not only to *change* and cramp the jurisdiction and powers of courts of justice, but would, if it could, DO AWAY WITH THE CONTRACT ITSELF, EN-

TIRELY, repealing as it purports to do *the law itself* which is claimed to be the very *corpus* of such contract, PARALYSE AND DESTROY the right to a special tax and ABOLISH forms of proceedings, *remedies*, which were in existence when the contract was entered into and which constituted, as an inducement, an essential element of the same.

It repeals the contract law and forbids FOR EVER the levy of *any* tax for Bonds previously issued.

A law which deprives creditors of a corporation of *all remedies*, impairs the obligation of a contract, and is invalid. 8 Wheat., 1; 1 How., 311; 2 How., 608; 15 How., 304.

Remedies cannot be altered, as regards antecedent contracts so as to render them *less efficacious or more dilatory* than those ordained by the law in being, when the contract was made. Peck 1; 1 How. 311; 8 Wheat 1; 2 Cal. 524; 3 Mart. 531; 40 Miss. 29; 15 How. 304; 12 Ark. 321; 9 Wis. 559; 28 Ark. 555; 2 Gratt. 472; 31 Penn. 175; 2 How. 608; 5 Ark. 506; 16 Miss. 9; 1 Mich. 68; 15 How. 304; 12 Ark. 321; 15 Wis. 20; 16 Wall. 314; 43 Geo. 337; 9 Cal. 84.

An act which totally suspends for an unlimited time all remedy is unconstitutional. Circ. Ct. N. C., 1798; 1 Car. Rep., 34.

That section is therefore unconstitutional and null, for the motives alleged and should be completely ignored, as effectually as if it had died *in embryo* or had never been conceived and brought to light.

But our opponents urge another objection: that the tax

which they are authorized to levy, *is limited to one and a half per cent.* of the assessed value; that they are prohibited from levying a higher rate, and that they cannot provide for the bonds in question, unless, in violation of the law limiting and prohibiting the exercise of their powers of taxation, and they refer to the preceding section, (Sec. 6 of the Premium Bond Act.)

Such a point was presented in the case of Van Hoffman vs. Quincy, 4 Wall. 535, and the Court held such law to be *null and void*, as impairing the obligation of a contract.

The same question was also, quite pointedly presented to the Supreme Court of the United States in the case of Butz vs. Muscatine, 8 Wall. 575. When the case came up, his debt having been contracted in 1854, the Court held that Butz was entitled to all the *remedies* to enforce his contract, in existence in 1854; that *such remedies could not be taken away by statutes subsequently passsed;* and that the law afterwards adopted, limiting the rate of taxation, had no application to his case and imposed no check, if a larger tax is required.

A mandamus lies against these municipal officers for dereliction of duty. See Charter 1870, p. 44, Sec. 32.

II.

If a *mandamus* lie, in spite of the two acts opposed, the next inquiry would be:

Have the Defendants and the Intervenors who have joined them, the right of raising the constitutional issues which they have sought to make?

When the case was called for trial, a motion was made having for its object to strike out the returns, and the Interventions, in so far as they assail the constitutionality of the section upon which the suit is founded, for several reasons, mainly; because the Defendants being mere ministerial officers, devoid of discretion in the matter, have *no interest* in attacking said section; because it is not *necessary*, to pass at present upon such constitutional questions; because such interventions are not allowable in *mandamus* cases of this description; because the Intervenors cannot, *now*, form issues different from those made by the original parties, and, so, agitate the questions raised, and because interventions do not lie where the parties have no right to bring a direct action. The Court did not act upon the motion, when it was presented, although it was allowed to be filed, but took it, under advisement, to pass upon it, after the whole case would have been heard. A bill of Exception was also taken to the filing of the intervenors joining the defence and is insisted upon as destructive of those proceedings.

In support of the motion to strike out, which is a sanctioned proceeding under the circumstances, the Relator quotes the following authorities:

COOLEY on Const. Limit. Ch. VII, p. 163, § III, to the effect that the Court will not "listen to an objection made " to the constitutionality of an act by a party, *whose right* " *it does not affect* and who has, consequently, *no interest* " in defeating it."

SAME AUTHOR, *loco citato*, § II, to the effect that a Court

will not "pass upon a constitutional question and decide " a statute to be invalid, unless a decision, upon that very " point, becomes *necessary* to the determination of the " cause."

XII A. R., p. 364, 366, in which the Supreme Court of this State held: "It is *only* for the party whose rights " are invaded, to plead the nullity of a law....."

XII A. R., p. 343, in which the Court refused to pass upon constitutional objections made, saying: "It will be " proper to consider the constitutionality of other portions " of the act (under consideration,) when they are shown " to affect the rights of the Defendant."

XXV A. R., p. 569, referring to authorities, the Court said:

"In these cases the right of a party, to raise the ques- " tion of constitutionality of a law, was limited, to the " provisions thereof which *affected his interest* in the liti- " gation.

XXXVII A. R., p. 430, in which the State Auditor, on an application for a *mandamus* sought to assail the constitutionality of a law, the Court refused to entertain the objection saying: "The Auditor has *no interest* in the solution of the question."

XXIX A. R., p. 271, in which the Relators (tax payers) sought an injunction to prevent the City authorities from ordering an election and eventually levying a tax, the *unconstitutionality* of which was charged, the following language was used:

"Courts of Justice have enough to do in dealing with

" real existing and present wrongs, without anticipating " and combating hypothetical evils of the future, that " may or may not arise. It will be time enough, for the " Plaintiff, to complain when their rights are actually " invaded, or when danger to their persons or property, is " imminent and impending".....If parties "were thus " allowed to interfere with, and embarrass the govern- " ment, its most ordinary functions would be completely " stopped, by persons claiming to champion and protect " the rights of the public."

To fortify that well founded theory, the Court then quotes liberally, with approbation, the ruling of the Supreme Court of Michigan (13 Mich. 548.)

XXI A. R., p. 449, the Court said :

"The Court cannot entertain abstract questions of law, " presented by parties without interest and wholly un- " affected by the illegalities or unconstitutionalities com- " plained of."

XI A. R. 672, which was an application for a *mandamus* to compel a Sheriff to levy a special tax, the Defendant, resisted the demand, alleging, among other reasons : that the Act of the Legislature, on which the Relator relied was *unconstitutional.*

The Court passing upon that defence said :

" The rights of this executive officer to raise these con- " stitutional objections is by no means clear. SUCH *a dis-* " *cussion would be more appropriate in the mouth of one of* " *those from whom the tax might be exacted... He has no* " *business to question the validity of these legislative enact-*

" *ments which constitute his official rule of action. As well*
" *might he, if called upon to fulfil that sternest of his duties,*
" *the execution of a capital sentence, question the constitu-*
" *tionality of capital punishment or the constitutionality of*
" *the particular law, under which the convict had been pro-*
" *secuted.*"

See also 8 Cowen, 543, 579; 6 Allen, 353; 16 Pick., 88; 23 How., 387; 23 Miss., 600; 8 Barb., 489; 11 Wend., 149.

"Respect for the Legislature, therefore, concurs with well established principles of law, in the conclusion that this ground of avoidance, can be taken advantage of, by those only who have *a riyht* to question the validity of the act...To that extent *only* is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power and to this ex- *only*, therefore, are Courts of Justice called on to interpose."

COOLEY on Const. Lim. p. 164.

A French commentator of admitted unquestionable authority, in his admirable work on NULLITIES, considers the question of who can ask, from Courts of Justice, to pass upon the nullity of acts attacked. He treats the question with remarkable erudition and force, and considers that, where assailed without *interest*, they should not be listened to, *maliciis hominum*, says he, *non est indulgendum;* and he concludes: *Il n'existe pas de nullité sans griefs;* there exists no nullity without injury. He quotes the French Code Chancelier d'Agnesseau, and a nnmber of decisions

from the Royal Courts and the Court of Cassation, consecrating that principle. Annulling an act at the instance of one whom it does not affect and who therefore has no interest to attack it,—that distinguished author says, *would be producing an effect without a cause.*

SOLON des Nullités, Vol. 1, p. 277.

The Defendants have *no interest* at stake, to the irrelevant issues presented. The determination of those issues is not *necessary.* Were the tax sought to be levied and payment of it pressed, the decision of this Court, not passing on those issues, now would not close the mouth of *tax payers.* They would have a clear right to resist payment if the law invoked by Relator, be unconstitutional, as is charged by the Defendants and the Intervenors who have joined them.

We therefore conclude that those portions of the returns in which an attempt is made to make those improper issues, should be stricken out and utterly disregarded.

The opinions of all the French Commentators, Toullier, Merlin, Marcadé, Larombière, Duranton, who have written on the subject of NULLITIES, are in perfect accord, that no one can ask a nullity, unless he is to be affected, has an interest to protect and which would be irrevocably impaired, did he not, *then* and *there*, claim that nullity.

No Court ought, unless the terms of an act render it *unavoidable*, to give a construction to it, which will involve a violation of the constitution and the judiciary must *decline* to express an opinion on the constitutionality of a law, in a case not requiring such a decision. 3 Pet.

433; 11 Miss. 661; 4 Harring. 389; 12 Wheat. 419; 3 Dall. 171; 6 How. 301; 27 N. Y. 400.

III.

We claim that the interventions should not have been allowed to be filed, and that the Bill of Exception, by us taken, to the action of the Court, admitting them to be put of record, as well as the motion to strike out, should be sustained.

Interventions are not allowed to be filed in *mandamus* cases.

When the writ was asked, to force the Secretary of State to sign and seal a commission, a party intervened, resisting the application, on the ground that it was not the duty of that officer to authenticate a commission of one, to an office *not vacant*, the Court said:

"*Mandamus* is necessarily a summary proceeding. It "is very questionable, whether in such a case the inter- "ventions of third parties can be legally entertained, "obstructing, as they must, the avenues of justice; par- "ticularly too, in a case involving, like this one, *grave* "and *important questions* of *great public interest*.

"The late Court, in 2 A. 490, in a *summary* proceed- "ing, pronounced an intervention, a derogation of com- "mon right, unauthorized by law.

"In Tapping, on *Mandamus*, referred to by Defendants, "it is said: 'The Court will, in general, allow all those "against whom the rule *nisi* has been granted, or upon "whom it has been served, or have had notice, or are

" legally interested in the question, to show cause.' The " term, *in general*, presumes exceptional cases, excluded " from the rule, and, one like this, would fall within the " exception, if such a rule had any binding effect on the " Courts of this State, which is controlled by its own rules " of practice, by which interventions are permitted in " *ordinary* suits, but not in *summary* proceedings."

State vs. Wrotnowski, 17 A. 159. Also 2 A. 488.

Commenting upon Art. 390, C. P., which permits interventions, by those only who have *an interest at stake*, this Court said :

" This, we suppose, must be a direct interest, by which the intervening party is to obtain an *immediate* gain, or *suffer* loss by the Judgment, which may be rendered between the original parties."

Gasquet vs. Johnson, 1 L. 425 ; Brown vs. Saul, 4 N. S. 434 ; Pierre vs. Mass, 7 N. S. 197.

Parties whose claims *cannot be prejudiced*, cannot intervene. 12 R. 215 ; 27 A. 239 ; also 24 A. 171.

When intervenors have claims which can be exercised *after* judgment, they are not permitted to intervene *before* judgment, particularly in an *injunction* and *summary* proceeding. Burrow vs. Sollibellos, 26 A. 290.

Where the State intervened to uphold the rights of a Plaintiff against a Defendant, and not to set up separate rights of its own, in regard to a franchise granted by itself, this Court held that the State *had not* the *interest* required to intervene and affirmed the Judgment of the lower Court dismissing its intervention.

Crescent City Gas Light Company vs. N. O. Gas Light Co., 27 A. 138.

The law defines an intervention as a "demand made by a *third* person."

The intervenors, in this case, are not *third* parties. They claim to be *tax payers* and to have an *interest at stake* in resisting Plaintiff's demand for the levy of a tax.

They are *citizens*, represented by the Defendants, who are the living embodiment of that *soulless* corporation, the City of New Orleans, of which the intervenors are the members.

The Corporation represents the Corporators to all ends and purposes. A Judgment against the Corporation concludes the Corporators, but *no further* than it concludes the Corporation.

It is needless to argue, to show the correctness of this proposition.

The Code of Practice, Art. 389, as amended, allows parties having an interest at stake, to "*join*" the Plaintiff, to "*unite*" with the Defendant or to "*oppose*" both.

Hence, intervenors are not permitted to make any issue differents from those of the parties litigant.

An intervenor's rights are *limited* to the protection of his *interest*. In a possessory action, he cannot put at issue the title, *which, a decision, on the question of possession*, CANNOT AFFECT.

5 N. S. 501; 8 M. 55; 4 N. S. 488; 3 L. 183; 8 R. 123; 3 A. 222.

They have no interest *at stake*, which the Judgment, in

this case, however favorable to Plaintiff, could impair.

Mr. Burroughs says, p. 446, that the right of a citizen and tax payer to restrain municipal officers, is resisted with great vigor; but that, even admitting, where he is *specially injured*, that it can be maintained, persons of that class, have no right, *otherwise*, to *intervene* and *defend* the rights of the community.

As already observed, on a previous question, in 11 A. 271, (the Roudanez case), it was held, in the same sense, that, if parties were allowed to intervene and embarrass the Government, its most ordinary functions would be completely stopped, by persons claiming to *champion* and protect the rights of the public.

But what justification have those intervenors, to interpose obstacles, in the litigation arisen between the original parties? They have no interest *at stake* which a Judgment issuing a peremptory *mandamus* could jeopardise, as already observed.

The *mandamus* would merely direct the Council to levy the tax. The performance of that ministerial duty, by the municipal functionaries, could not of itself *conclude* the parties, upon whose property the tax would be levied, so as to close their mouths against the defences to which they would pretend, if any, against the validity of the tax, for any cause.

In the case reported, in 11 A. 672, in which the ruling was made, that a ministerial officer had no right to question the constitutionality of a law requiring him to levy a tax, the Court very properly remarked:

"*Such a discussion would be more appropriate in the mouth of those from whom the tax might be exacted.*"

It would indeed be *monstrous* to seal the mouths of tax payers, and drain their pockets, merely because a City Council levies a tax. The tax payers, *after* the levy, would certainly and unquestionably have the right to resist payment of the tax for any reason, which a Court of Justice could countenance. They would, by no means, be *estopped* in this case, by the mere fact of the levy of the tax by the Council, under the *mandamus*, but would have the right seasonably to urge any proper defence, against the law under which the tax would be claimed.

The interventions, therefore, should be dismissed, because they are not admissible in *mandamus* proceedings of this character; because the intervenors are not third parties, because they raise improper issues; because they have no interest at stake which could be endangered by a Judgment adverse to the Defendants; because their pretensions are prematurely set up and, if well founded, can be determined *after* the tax shall have been levied and an attempt shall have been made to coerce its payment.

In support of the motion made by the Relator, to strike out from the answers and the interventions, the improper issues sought to be made, we refer to 3 R. 364; 20 A. 193; 21 A. 271; fully appreciating the qualifications therein made, but which the conditions of the pleadings required.

In the present instance, the motion to strike out was the *better* practice, for the obvious reason, that, as far as the constitutional objections raised go, no evidence could

be offered and, therefore, be objected to, and the object in view was to dispense with the discussion of matters entirely irrelevant, for the determination of the right of Relator, to the particular relief sought in this case.

IV.

That the Defendants and the Intervenors have no right in this proceeding, to question the validity of Section 37, relied on for the validity of the tax, results besides, from TWO JUDGMENTS previously rendered, at the instance of holders of Bonds issued under said section, contradictorily with, and against, the City of New Orleans, and which are set up as ESTOPPELS.

The FIRST judgment was rendered by the U. S. Circuit Court, in equity, in the case of MAENHAUT, offered in evidence, (2 Woods, 108,) in which the complainants claimed to be entitled, for themselves and those concerned, to the distribution of the taxes levied, collected and deposited in bank, by the City of New Orleans, to the credit of the Consolidated Debt, and which the City refused to pay out, unless, to those who would agree, in writing, to receive 50 per cent. *only*, of their coupons, and allow her to use, at her whim, the remaining half.

Their right *was put at issue* and *denied in peremptory language*. The unconstitutionality of the law in question was even charged, and forcibly, but in vain, presented in argument.

The Court ruled that the Section was constitutional and was a CONTRACT binding on the City and State, which

the 7th Section of the Premium Bond law, could not and therefore, did not, impair, and that the complainants had a right to have the tax so raised, distributed among all Bondholders, situated like themselves, in extinguishment of their coupons overdue.

The parties were the same, litigating in the same capacity, the cause of action was the same and the object, (the right to a tax) was *identical*.

It is true that the Complainants had, besides, prayed for an *injunction*, to prevent the City from using the tax raised on the real estate affected in their favor, without first providing for them, in the manner required by Section 37. The Court held, that the Complainants had mistaken their remedy, which was clear, namely: *a mandamus at law*, after judgment, to compel the levy of their tax; that, by ordering the distribution of the tax realized and on hand, the powers of the Court were exhausted; but, that all the rights of the Complainants, not passed upon by the judgment, were reserved for future action at law.

Reference has already been made to this judgment.

The *second* case, is that of MONTGOMERY, before the same Circuit Court, at law, also in evidence in this case.

The Plaintiff in his petition, alleged ownership and possession of a number of the overdue and unpaid coupons of the Bonds in question, averred the proceedings, CONTRACT and judgment in the MAENHAUT case, and prayed for judgment for the amount of the coupons, reserving his rights, under said Section 37. The City appeared and

joined issue. The case was tried and judgment was rendered, as prayed for, "reserving to Plaintiff all the *rights, actions* and *remedies secured* to him, under and by virtue of Act No. 71, of February 23d, 1852."

The *first* Judgment was acquiesced in by the City, who voluntarily executed the same.

The second Judgment has not been appealed from, and has become SOVEREIGN.

It will be noticed that the reserve of the rights, actions and remedies of Plaintiff, under Section 37, *is unconditional*. The words "*if any*," or others, susceptible of being considered, as leaving a door open, for future consideration, have not been used, and the reserve, *as made*, is in strict conformity with the peremptory prayer of the petition.

The requirements to constitute *res judicata* co-existing, these Judgments are, conclusive, as pleas, in another suit. R. C. C. 2286, H. D. 751.

Where a judgment is rendered on part of a debt, in the hands of a party, defences which could have been set up against that claim and were not, cannot be urged against the other parts of the same debt. Bigelow, p. 99, 100.

Bigelow on Estoppel, 110; 2 Woods, 474; 4 Wall., 435; 9 Wall., 409; 24 How., 33; IV Otto, 351, 606; 7 Ala., 257; 11 A., 629; 13 A., 458, 3 Rob., 171; 4 Merlin, 430; 8 Dalloz Jur., 257.

The City is also effectually estopped by her own acquiescence and execution of the law during a generation; for—

from *1851*, when the statute assailed was passed, to 1874, when the tax was temporarily suspended, for sinking fund purposes *only*, by legislative enactments, and down to *1876*, when the Premium Bond law was *forced* through, and sought to be imposed, as it were by violence, on bondholders,— the tax required by the 37th Section, was uniformly, annually levied and collected by the City, and its proceeds applied (*when not diverted*,) to the extinguishment of the Consolidated Debt, in the mode prescribed by the Section, first to retire the matured coupons, next to the redemption of the Bonds, with the surplus. The tax required to be raised, was $650,000. In certain instances, a larger amount was collected, but more frequently, the collection realized less.

The Consolidated DEBT and the Consolidated TAX have been, time and again, in all the acts mentioned in the petition, acknowledged and *provided for*, by the Legislature. The Acts are *15* at least in number. 1852, Nos. 72, 142; 1854, Nos. 108, 109, 110; 1855, No. 166; 1856, No. 164; 1859, No. 133; 1860, No. 3; 1869, No. 49; 1870, No. 7; 1874, No. 53; 1876, 31. The defences set up by the Administrators under the circumstances, as a matter *of law*, are subversive of all principles of justice and, otherwise, are revolting to our moral sense.

The very charter under which the City of New Orleans, now breathes, fastens the consolidated DEBT on her, and makes provisions for the levy of the cansolidated *TAX*. 1870, No. 7, Sec. 12, § 20, Sec. 34, p. 37 & 45.

Bigelow, 582; 64 U. S. 672; 29 Conn. 175; 21 How. 539.

In the case of Brand vs. Donaldsonville, 28 A. 559, the Court said:

"The Corporation in 1861 was anxious to settle with "its creditors and procure a long term of years for pay- "ing the debts, it considered it then owed. The defendant "says, that the writing or evidence of the debt, which "was taken up *in exchange* for the consolidated bonds, "was not such as to bind the corporation. If the cor- "poration used the money or received consideration for "the debt owing Plaintiff, it had authority to give him "in 1866, consolidated bonds in place thereof. It not "only had authority, but it was the *duty* of the corpora- "tion to pay its honest debts, *however invalid* the writing "or instrument evidencing them and whatever technical "objections there might be to the same.

"CORPORATIONS, LIKE NATURAL PERSONS, SHOULD BE "HONEST.

"Whatever defense there was to the claim, was pre- "sumably known at the time of the settlement. If there "was not then, a valid legal obligation, there was at least "a moral obligation, which *was* a good consideration for "the Bonds. If there was no other consideration, the "delay of ten years was a legal consideration, for the "compromise of 1866, under which the Bonds issued."

The language of the Supreme Court of Connecticut is admirable on the subject of the moral obligation of corporations. It would deserve being printed in gold letters,

and held conspicuous in Judicial and Legislative Halls and Council Chambers.

It is in the following words:

"*Perhaps no one thing has done more to disparage the* "*fair fame of our Country abroad, or to impair the inte-* "*grity of our Institutions at home, than the loose sentiments* "*which prevail in some parts of the land, as to public and* "*corporate indebtedness. It seems to be thought by some* "*people that as to obligations of this character, nothing more* "*is called for from the debtor, than what is agreeable, easy* "*and convenient. Honor, honesty and punctuality are* "*thought to be quite foreign to the subject.* BUT THIS IS A "GREAT MISTAKE, false and ruinous in the extreme. These "virtues are as essential to public Bodies, as to indivi-"duals and the Nation, *State, City* or Municipality that "does not observe and cherish them, has upon it, a blight "which will in the end destroy its best interests."

Savings Society vs. New London, 29 Conn. 175.

The plenary control of the Legislature, over the subdivisions of the State, will always allow it to cure any defect (if any) by subsequent legislation recognizing the validity of the Bonds. Burroughs, 431. 5 Wall. 194. 1 Cranch, 299.

"Respecting negotiable bonds issued under legislative authority by Municipalities, when in the hands of *bona fide* holders, the Supreme Court of the United States influenced, doubtless by a keen sense of justice and odium of repudiation, has, at all times displayed a strong determination effectually to enforce payment..... Upon the

whole, there is little doubt that its course has had the approval of the profession in general and of the public, which neither appreciates, nor cares for fine distinctions, and it will be well, if it shall teach Municipalities, the lesson that, if having power to do so, they issue negotiable securities, they cannot escape payment, if these find their way, into the hands of innocent purchasers.

Dillon, Ch. XVI, § 415, 416, and authorities quoted. See also 7 Monroe, 12.

V.

As already said, in its wise policy, the law does not permit any one to assail the constitutionality of a legislative enactment. At one time, it was doubted, whether the Judiciary could pass upon such questions; but it is now settled that the Judiciary not only *can* but *must, in given cases*, pronounce upon such matters, for a proper balance of the different departments of the Government. The party assailing, must have a *personal interest*, which the statute attacked, *affects*. The determination of the question must be so indispensably *necessary*, that the case can not be *properly decided, otherwise*. The conflict between the Statute and the Constitution must be clear, evident, nay GLARING. In cases of doubt, the act must hold.

The Court, when impelled by duty, to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. It is not on slight implication and vague con-

jecture, that the Legislature is to be pronounced to have transcended its powers and its acts, to be considered as void. The opposition between the Constitution and the law should be such that the Court feels a clear and strong conviction of their incompatibility with each other.

The presumption is in favor of every legislative act, and the whole burden of proof lies on him who attacks its constitutionality.

The respect due from one branch of the Government to another, will lead the Judiciary *to decline* to express an opinion on the subject matter of the constitutionality of a law, *in a case not requiring such a decision.*

No Court ought, unless the terms of the act render it unavoidable, to give a construction to it, which will involve a violation of the Constitution.

If a State Legislature shall pass a law *within the general scope of their constitutional power*, the Court cannot pronounce it void because it is in their judgment, contrary to the principles of natural justice which are regulated by no fixed standard and upon which the purest and ablest men differ. All the Court could properly say would be, that the Legislature has passed a law which, in the opinion of the Court, was inconsistent, with the abstract principles of natural justice.

Bump on Const. p. 336–339.

Cooley on Const. Lim. p. 163; 11 A. 364; 12 A. 343; 25 A. 569; 27 A. 430; 29 A. 271.

47 N. Y. 504; 49 N. Y. 136; 66 N. Y. 162.

56 Barb. 533; 54 Barb. 180; 1 Cowen, 550; 6 Cranch

167; 1 Wheaton, 625; 7 Pet. 662; 2 McLean, 191, Edwards vs. Dupuy, 21 A. 694.

38 Geo. ; 35 Cal. 606; 11 Ark. 481; 29 Con. 210; 6 Fla. 610; 2 Iowa, 60; 15 Md. 376; 1 Mich. 295; 39 N. H. 304; 50 Pa. 150.

The Defendants having *no interest* at stake which the Judgment sought by Relator could affect, and the determination of the constitutional questions raised, not being *necessary* for the decision of the case, those questions should not be entertained.

VI.

We now come to inquire whether Section 37 is open to the objections made to its validity.

It is charged against it, that:

1°. ITS OBJECT IS NOT EXPRESSED IN ITS TITLE, and

2°. THE SPECIAL TAX WHICH IT MAKES THE DUTY OF THE COUNCIL ANNUALLY TO LEVY, IN JANUARY, IS NOT EQUAL, AND UNIFORM.

And it is therefore argued, that the section is doubly unconstitutional and doubly null and inoperative.

FIRST.

What was the object of that section? It was and still is, to regulate the mode of extinguishing the Obligations of the Municipalities, consolidated into the City, as part of its affairs. The title of the law covers such an object fully. The act may be said to be one "*relative to the government of the affairs of the Consolidated City of New Orleans.*"

Every reasonable man on reading the title of the law in question, (Act 71 of 1852) received a full knowledge that the act which it heads, contemplates the administration of the affairs of the City, and irresistibly inferred, from such a title, that the means required for the accomplishment of such an important purpose, are necessarily provided for. How is a city to provide for its affairs, otherwise than by its revenues? How are its revenues raised, otherwise than by taxation or rather by *contribution?* How are its revenues applied, unless to the payment of its undebtedness, *eo nomine*, and to the actual expenditures of government?

The City of New Orleans, it must be borne in mind, was created in 1805. It continued as a self-administering Corporation, until 1836, when it was divided into three Municipalities, *each* of which had corporate powers, having rights and obligations, susceptible of acquiring other rights and incurring other obligations, and clothed with all the facilities proper and necessary for a proper municipal administration, including formally the right of taxation, *each* within its own limited and defined territory.

Such cantling of a City, has no precedent, to our knowledge, in this country, or, on the old Continent, and is therefore isolated.

It was anticipated, that at some future time, the fragmented, sub-Corporations might be "*readjusted and reconstructed;*" but it was enacted that, in the event of such reunion, the debts of the municipalities would be provided for.

The moral sense of duty which animated the pure rulers of the country in those days, could not inspire them otherwise.

The Municipalities so organized went on until February, 1852, when being involved it was determined to bring them back, under one sole administration again. Each municipality was differently embarrassed. The pecuniary liabilities of each varied, and the rate of taxation by each, within its own territory, was in proportion to its necessities, for purposes of administration, including that, for its indebtedness proper.

Unequal indebtedness, unequal expenditures, required, as a matter of necessity, and justice, unequal taxation *throughout the City*, but equal and uniform in each municipality or districts composing the same.

Those who dealt with the municipalities, contracted on the faith that, in case of a reunion, their debts would be provided for and regulated. They were not deceived. Those who contracted under Section 37, had reason to believe that they would not be deceived. Why should they be, after TWENTY-FIVE years of recognition by the Legislature and Judicial Departments of the Government?

The Constitution of 1845, was adopted during the existence of those municipalities. It provided, Art. 127 :

"Taxation shall be equal and uniform *throughout the State*," and, these municipalities, as three distinct corporations, assessed their taxes, at a rate *equal and uniform, each* within its own geographical boundaries; *but, the rate in the one, was different from the rate in the others.* Une-

qual indebtedness and unequal costs of administration, necessitated unequal taxation. Such would still be the case : taxes, not equal and not uniform, throughout the City, would be still levied and collected, in each municipality, had not the consolidation act of 1852 been passed. The Constitution would not be infringed, and not a living soul would have dreamed to charge against *such tax*, so raised, in each municipality, its invalidity, based on its inequality and non-uniformity *throughout the City*.

The tax was equal and uniform in each Municipality or District.

We have seen for what reason Article 118 was inserted in the Constitution of 1845, which was in force when Act 71 of 1852, containing Section 37, was passed. That article has been repeated in the subsequent Constitutions of this State, 1852, 1864 and 1868. It bears No. 114 of the last, now in force, but with important modifications.

It then read : " Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in its title."

Mr. Sedgwick, very properly says, in justification of that article : (p. 567.)

" Great abuses have been found to result from a prac-
" tice of ancient date of incorporating in the same Bill.
" subjects of a very heterogenous nature, resorted to either
" for the purpose of surprising the good faith of the law
" making body, or of enlisting hostile interest, in support
" of the proposed acts. To put a stop to this practice,

" many States of the Union have incorporated into their " fundamental laws, the provision" necessary to guard against the same. See *note.*

In 6 A. 605, Municipality vs. Michoud, the Supreme Court of this State held that the article should not be strictly interpreted; that it is sufficient, if the object is stated in the title, according to the understanding of *reasonable men.*

In 9 A. 350, Lafon vs. Dufroc, the Court held, that the title attacked, afforded a sufficient *clue* to its object and maintained the act.

In 9 A, 829, Succession of Lanzetti, the Court declined to follow the rule of a nice and fastidious verbal criticism. It said, it would frustrate the action of the Legislature, without fulfilling the intention of the framers of the Constitution.

In 11 A. 145, Kathman vs. New Orleans, the Court held that the very *title under consideration*, of Act 71 of 1852 was broad enough to cover a dispensation, of the City, from furnishing bond in judicial proceedings.

In 10 A. 765, New Orleans vs. Cannon, *the very same title in question in this case*, was held comprehensive enough, to cover the mode of summary *citation* by publication, in newspapers, of the names of delinquent tax payers.

In 12 A. 343, State vs. Waples, the title of the act assailed was held sufficient.

In 21 A. 538, State vs. Leovy, the title of the act to determine the mode of filling vacancies was held sufficient to cover all the objects mentioned in the body. That is

the case in which Beckwith was installed and our friend Leovy, ejected as *City Attorney*.

In 23 A. 743, Lottery Company vs. Richoux, the title was held sufficient to cover its objects. The Court said that Legislatures are not *philologists*. This decision, is no doubt correct, but it remarkably suited the times, for, had it exacted from Legislators, the knowledge of reading and writing, the probability is, that it would have been impossible under the *régime* in existence, to constitute a General Assembly.

In 11 A. 66, Arnoult vs. City, it was held that *two* acts are not *necessary ;* one to order a thing to be done, and another to indicate the *manner* or mode of execution.

The mode of carrying out the object of the law need not be stated in the title ; otherwise, a title would necessarily be almost as long as the act itself!

23 Ind. 317 ; 8 N. Y. 241 ; 5 Sandford, 10 ; 19 N. Y. 116 ; and Louisiana authorities.

The motive which induced a requirement of the expression of the object of a law in its title, is that *reasonable, men particularly those to be affected by it, should have, on reading the title, a clue to its contents.*

IN THE PRESENT CASE, THE EXPERIMENT HAS BEEN TRIED FOR TWENTY-FIVE YEARS. From 1852 to 1876, the Legislature has invariably considered the title under consideration. as sufficient and highly satisfactory. Acts have been passed entitled "an act to amend : an act to consolidate the City of New Orleans and to provide for the Government of its affairs."

The charter of 1856, No. 164, is one of them.

63 N. Y., R., p. 8, Sedgwick on Stat. and Const. Law, p. 518, 2d Ed.

The City Council have taken notice of Section 37 and of its expression in the title. Never, until the present Council was constituted, have the municipal authorities failed to levy the tax claimed by Relator.

Tax payers affected by the operation of Section 37, who had an interest to resist it, have considered themselves well informed of its existence by the title; and bound by its requirements. They have paid the taxes raised, *during the quarter of a century*, under its provisions.

Last, but not least, the Supreme Court of this State, has, in a number of instances, rendered Judgment against tax payers, for this identical Consolidated Tax, on resistance made by them, to payment of *any tax*, for reasons urged, none of which was the unconstitutionality of Section 37, as not expressed in the title of the act, or as otherwise, objectionable.

The cases are 8 A. 365; 10 A. 454, 730, 732, 764; 11 A. 145; 16 A. 429.

Where an act was entitled "an act to establish a police government for the City of Detroit," it was held that the title was not objectionable, and that all matters properly connected with the establishment and efficiency of such a government *including taxation*, and *Courts* for the trial of offenders, were constitutionally included under it.

The decision in the case of the City of MONROE in this

State, reported in 26 A. 675, has *great bearing* on the present question.

It was an injunction suit to prevent a sale for taxes, on the ground, that *the power of taxation had not been conferred on this city*, and the Defendant had no right to sell the property of the Plaintiff. The Court quotes the section of the charter, under which the tax was laid (and which is by far less positive than Section 37 of the Act of 1852), and the Court adds :

"We think this section confers full authority on the "City of Monroe, to assess and collect tax and to impose "penalties for non-payment..... The State can confer "this power, because there is no limitation in the Consti- "tution.

"There is no force in the objection that Sec. 25.....is "not covered by the title and therefore repugnant to "Article 114 of the Constitution and void.

"The title of the act is: 'An act to incorporate the "City of Monroe'.....TO PROVIDE FOR THE GOVERNMENT...

"The statute would fail '*to provide for the government*' "of the City of Monroe, if it failed to authorize the levy "and collections of taxes."

The Defendants seem to have yielded somewhat on this point, and to have restricted their charge against Section 37 ; because it provides for the levy of a special and annual tax, not for the *support* of the City, but for the payment of the debts of the old municipalities, incurred before their consolidation.

Now, really, how can such a charge be made ? Bear in

mind that, by the act of consolidation which wiped out the three municipalities, and substituted to them the City of New Orleans, all the *rights* of those municipalities were transferred to the City of New Orleans, and all the *obligations* of those sub-corporations were imposed upon that City. The charter of 1852 was accepted by the citizens of the city who shortly after its adoption, elected the officers necessary for the government and administration of its affairs. That solitary fact of the *accepted* transfer of the rights and obligations of the old municipalities by the City of New Orleans, is sufficient in itself *as a contract*, not only to make the City of New Orleans responsible for all the debts and liabilities of the municipalities, but also to confer on the City the *powers of taxation* which those municipalities had, for their own government and administration, and the liquidation and settlement of their respective indebtedness.

Bullard & Curry, 120, 125, 128, 129.

Act of 1836 creating the municipalities, p. 28, Sec. 2, 4, 15. Act of 1852, No. 71, p. 52, to Sec. 36.

Now, let us suppose that the Legislature of 1852 had been composed of men like those who sat in that Body in 1876, and passed knowingly Section 7 of the Premium Law, *indifferent*, *ignorant*, or *mischievous*, (of course there are always some honorable exceptions) and an act had been passed abolishing the municipalities entirely and creating a new City, without any transfer of their rights and obligations, or even with a distinct transfer of right, but formal exemption and immunity of the obligations of

their liabilities, would the creditors of those municipalities have been concluded by such monstrously unjust, immoral and unconstitutional legislation? To the honor of the Country, it must be said that there is only one contemporaneous precedent for such a course of public contempt and violation of sworn official duties, but that it was not tolerated for a moment.

Dillon on Municipal Corporations, vol. I., p. 114, says: "As respects creditors of a municipal corporation, their "rights are protected from legislative invasion by the "Constitution of the United States and NO REPEAL OF A "CHARTER OF A MUNICIPAL CORORATION CAN SO DISSOLVE IT AS "TO IMPAIR THE OBLIGATION OF A CONTRACT or, it may probably be safely added, PRECLUDE THE CREDITOR FROM "RECOVERING HIS DEBT."

This doctrine is supported to the fullest extent, by the following authorities:

Bump, pp. 120 to 141; and 208 to 224.

Cooley on Const. Lim. 290, 292; 15 How. 312; 3 Wall. 327, 294; 3 Kent. note 307; 6 Ind. 403; 24 Miss. 278; 15 Wis. 30; 39 N. H. 435; 4 Wall. 535; 8 Wall. 583; 1 Dill. 134, 522; 8 Pet. 281.

The lamentable precedent to which we have referred, and which disgraces the Legislative records of a sister State, worse than ours have so far been stained, is found on the statute Book of Florida.

Judge Woods, of the United States Circuit Court, who sat on the case, in a learned, elaborate, powerful opinion, after a review of authorities applicable, said:

" My conclusion is therefore that *no Legislation of the* " *State of Florida, could so destroy the City of Pensacola,* " *as to relieve it from the obligation to pay the Bonds issued* " *by it; that the present City of Pensacola is the same* " *corporate body as that by which the Bonds were issued,* " *reorganized and clothed with a new charter and with new* " *powers and privileges, it is true, but still, the same* " *municipal corporation and liable to pay the Bonds and* " *Coupons in controversy in this suit.*"

Any other conclusion would produce the most MONSTROUS *results.*

It would put it in the power of every city and town in Florida to cancel all its indebtedness. . . . It would enable every city, which receives a new charter, to repudiate all indebteddess contracted under its old one and leave the holders of its bonds utterly without remedy. 2 Woods 642.

The Supreme Court of the United States affirmed this ruling unqualifiedly, with deserved compliment to the Judge of the lower Court. 3 Otto, 266, 271.

Strictly speaking, it was not necessary for the Legislature of 1852, to provide that the consolidated city would be liable for the debts of the municipalities. The provision however was honorably made. It was just that it should be so. The power of taxation, for the purpose of extinguishing those debts was virtually and sufficiently expressed in the title as a matter germane and pertinent. No one had, ever claimed so far, adversely to that law.

SECOND.

The next charge is, that section 37 is also inconstitutional, because it orders the levy of a special tax, which IS NOT EQUAL AND UNIFORM, as required by Art. 127 of the Constitution of 1845, which was in force when the act 71, of 1852, wherein that section is embodied, and, besides, because the tax is required to be raised on *real estate only*, and not on *personal* property, and that this is a *prohibited discrimination*, in favor of the latter to the detriment of the former; that the tax is illegal besides, because it is to be levied on a past assessment.

The article relied on, provides: "TAXATION SHALL BE EQUAL AND UNIFORM THROUGHOUT THE STATE."

In almost all the States of the Union, there exists some similar provision, but the words "*throughout the State*," were insisted in the Constitutions of only: Virginia, Texas, California and Louisiana.

The words "EQUAL and UNIFORM" have a legal meaning. The former was not inserted to mean the same thing as the latter, and *vice versa*. The use of the copulative "*and*" proves that the intention of the framers of the Constitution has been to add to the word *equal*, what force was to be found in the word *uniform*, and which was wanting in the word *equal*. A tax merely *equal* would not meet the constitutional requirement. A tax merely *uniform* would not satify the same exigency. Hence the *tax*, to be constitutional, must be both *equal* and *uniform*.

The word *equal* means "Just, equitable, giving the same

rights and advantages, being on the same terms, enjoying the same or similar benefits."—Webster's Dictionary.

The word *uniform* means "*alike*," one and the same, in amount, on the property taxed.

Hence the beautiful allegoric definition, of taxes, by a deep and poetical public economist:

"Taxes levied by the sovereign upon his people, should be like the light vapors which the sun extracts from the earth, to be returned to it in fertilizing dews."

How profound, how just, how refreshing.

Now a days, taxes are what Mr. Burroughs defines them to be, but unfortunately, although raised for ligitimate purposes, how often, most unfortunately, does it happen that if converted into "fertilizing dews," they are not returned to the people, but in a great and scandalous measure, they are diverted from their lawful objects and *perverted* to the corrupt and iniquitous aggrandizement of public spoliators!!

As used in the Constitution of 1845, and ever since, for they have not been altered, they have been construed to apply to State taxes—*ex terminis*, and not to *municipal* taxes. It might have been said with greater force, perhaps, that they apply to State *taxation only*, because the right and power of *taxation* belongs to the State *alone*, as an attribute of sovereignty which cannot be delegated. That which the State has transmitted, is not a *power of taxation*, but merely a power of striking or calling *contributions*, and this only, to municipal corporations, or certain public functionaries for *local* and not *general* or *State*

purposes. It would be absurd to hold that the State can delegate the power of *taxation* to a subordinate functionary with local and restricted territory, for that would mean, that the power to be exercised under the delegated power *of taxation*, would be for *State* and *not local* purpose.

Hence, it is true, the Courts have often decided that local assessments imposed upon property benefitted, ARE NOT TAXES. Mr. Burroughs admits this fact, p. 2, § 5.

It may be that a Municipal Corporation shall not have the right to call for any *contribution*, without proper authority; but it would seem that Corporations, *ex necessitate*, must have the power to call for *contributions*, indispensably necessary for the unavoidable expenses of actual government; for, who wants the ends, impliedly, wants the means to accomplish the purpose in view.

The case of the incurring of any debts, appears to be different. A corporation may not have the power to contract any debt, but when it has the right, either because implied or because expressed, of contracting an obligation, the right of levying, collecting and applying a *contribution* to the debt legally created, exists independent of any legislation. Hence it is, as we will see, in 2 Woods, 632, and 3 Otto, 266, that it has been held,—that, where a Municipal Corporation had incurred valid debts and was subsequently abolished, and a new one created, to succeed it, *relieved* from the obligations of the defunct juridical being.—the new Corporation would be responsible for the liabilities of the former one, and that it required *no express stipulation to that effect.*

Applying this theory to our case, in which we find that the three municipalities had the express power to contract debts, and had the right to levy and did levy, *contributions* to meet the same; that the Legislature upon consolidating them, declared formally and solemnly that the Consolidated City would be liable therefor, and would make a certain adjustment with the creditors of the Municipalities, which took place; that for the purpose of paying the old debt, a special *fixed tax*, would be levied and applied at a particular time and in a particular manner, and that this has been done during **25** years, not only without protest, without murmur, but with alacrity, with a knowledge of the legality and morality of the tax, which under the explanation given above was equal, (equitable) and uniform, (one and the same) throughout each municipal district of the city, which had been *benefitted* by the disbursement of money, *which had to be returned*.

It was reserved to these days of gambling and kiting hallucinations, in the administration of public affairs, to imagine a *forced* scheme by lottery, for the payment of creditors whose claims for payment of capital and interest, had fixed dates and had solid securities.

Nor can it be denied, that neither the debt, nor the power to raise money to pay it, had any legal existence.

Hence, it is evident that the power to raise funds by contributions to pay the old City Debts, was not required to be delegated, but passed as a matter, of course, to the Consolidated City.

The propriety of levying it, as was done, is glaring. It

could not be raised on *personal* property, capital or other, for, that kind of property easily changes *situs*, and is slippery and more than uncertain. The creditors with whom a *compromise* was sought, would never have accepted such terms. It was necessary to give them, the assurance that the object of taxation would be palpable, tangible, and to fix a settled value to the real property so made liable, and determine the amount to be raised annually. Therefore, the reference to the assessment of 1851, and the fixing at $650,000, the amount to be annually levied and applied to the extinction of that debt. It is known, that the citizens and the creditors had previously, rejected a different mode of settlement, which offered little or no security.

Very shortly after the adoption of the Constitution of 1845, the Supreme Court of this State, was called upon to determine, whether that article applied as well to *Municipal* as to *State* taxation. The ruling restricted the *equality and uniformity* of taxation, to *State taxation*, having in view to fill or replenish the *State* Treasury.

A similar ruling was made by the Supreme Court of Virginia, in whose Constitution the words "*throughout the Commonwealth*" had been introduced, coupled with the provision of *equality* and *uniformity* of taxation. 13 Gratt., 577. (See also 13 Ark., 351, Washington vs. State.)

The Rulings of our Supreme Court, are to the effect that the article applies to *State* and not to *Municipal* taxation

The *first* case in which the point was presented, was

determined, on appeal, in 1847. It was fully considered by the Court, two of the members of which, had formed part of the Convention of 1845. Chief Justice EUSTIS, one of these, the organ of the Court, said: 2 A., 183, Municipality vs. Duncan.

"The article, *by its very terms*, applies to *State* and not "to *Municipal* taxes. It provides for the equality and "uniformity of taxation *throughout the State*."

It is to be observed that the tax claimed in that case, was levied, *on real estate only*, though the charter authorized taxation on *real* and *personal* property.

The Court on that point holds:

"*It does not appear to us, that the power to tax real and "personal estate, renders it imperative on the corporation to "tax* BOTH."

1 La., p. 1; Oakey vs. Mayor, 5 Dana, 516; Louisville vs. McQuillan, 5 Dana, 28; Sutton vs. Louisville, Federalist No. 21; 2 Story on Const. 994; Debates La. Convention 1845, p. 892 and seq; 4 Wheaton, 430.

Also: 8 A., 128; 9 A., 563, 573; 11 A., 629.

This decision was affirmed *totidem verbis*, in 3 A., 673, in 4 A., 548. The principle *which it expounds and consecrates had become a* RULE OF PROPERTY *in 1852, when the consolidation act in question, was passed and, the Bonds, mentioned in Section 37, were issued.*

The Legislature, the Council, the creditors of the Municipalities, innocent parties, volunteering, *under the inducements offered*, to assist the City, in her embarrassments, by accepting or buying her Bonds, at par, or at a pre-

mium, *taxpayers*, ALL, were aware of those repeated adjudications, took them to be a correct and final exposition, as *stare decisis*, of what the constitutional article in question meant, at the time, and were governed accordingly.

It was not until 1854, *after the act of 1852 had been executed*, that the principle announced and settled as stated, was drawn in question The Supreme Court of that year, by a *bare* majority decree of three Judges (Chief Justice Slidell and an Associate Justice dissenting) held: that the article in question applied, *not only* to *State*, but likewise, to *Municipal taxation*. 9 A., 447.

But, in 11 A., 220, Yeatman vs. Crandall, this decision was overruled, one of the three Judges, discarded his previous opinion and the principle, as laid down in 2d, 3d and 4th Annuals, was re-established, the Court holding that the article, *applies to State*, and *not to Municipal taxation*. Mr. Justice SPOFFORD pronounced the opinion "*readjusting and reconstructing*" the jurisprudence of the State on that point. Mr. Justice *Voorhies*, who had made weight in 1854, as one of the majority, changed his views, saying: "I yield my former impressions.....the more "readily, because the Supreme Court which sat under the "Constitution of 1845, and *five* of the *seven* Judges, "with whom I have sat upon this Bench, have concurred "in holding that the article in question *was not intended* "to appply to *Municipal*, or local taxation, for local pur- "poses."

See further 12 A. 346, Jamison vs. N. O.; 14 A. 498;

Wallace vs. Shelton; 12 A. 432; Surgi's case, 11 A. 387.

As just stated, the construction put on Art. 127, of the Const. of 1845, by the cases in the 2d, 3d and 4th Annuals had become a *rule of property* at the time of the passage of the Act of 1852 and of the issuance of the Bonds under Sect. 37 thereof.

In 1 Wall 206, City of Dubuque case, the Supreme Court of the U. S. said:

"..... The sound and true view is: that, if the contract, when made, was valid by the laws of the State, "AS THEN EXPOUNDED, by all departments of the Government and administered in its Courts of justice, its validity and obligation, *cannot be impaired by any subsequent* action or legislation, or *decision* of its Courts, altering the construction of the law. *The same principle applies where there is a change of judicial decision*, as to the constitutional *power of a Legislature to enact a law*. To this rule, thus enlarged, we adhere. It is the law of this Court. It rests upon the *plainest* principles of justice. To hold otherwise, would be, as unjust, as to hold, that rights acquired under a statute, can be lost by its repeal."

This doctrine was reiterated and affirmed in 3 Wall. 294, 327; 9 Wall., 55, 477; 2 Otto., 683. See also 16 How., 416, 432; 1 Ohio, 563; 7 Wall. 181; 16 Wall. 678· 2 Wall. 294; 4 Wall. 270; 26 Iowa, 243; 19 Wall. 666; 8 Wall. 575.

Keeping in view these authorities of superior respect-

ability, on Constitutional questions of that magnitude, arising under the Federal Constitution, whose sole legal expounder is, its highest Court, it would seem, that a subordinate Tribunal, should bow in humble deference, and sternly decline, at this late date, (***1878***), to rule adversely to what the Supreme Court of the State, had determined and which was the settled construction of a constitutional provision at the time, (***1852***) the Bonds in question were issued; *particularly* when, as in this case, the correctness of that construction, after being attended with some perplexity and vaccilation, has been, after new mature deliberation, again proclaimed, and is now considered at rest.

But, even, supposing that the doctrine in the Benton street case (9 A.) had not been repudiated beyond reconciliation, and had been repeatedly recognized and solemnized since, it must be admitted, that the change in the Judicial interpretation of Art 127, of the Constitution of 1845, could not affect the rights of innocent holders, who should be protected against any invasion, from whatever quarter and under whatever pretence.

On the merits of the question, we are opposed with the authority in 3 Ohio, O. S. 1, quoted with approbation by Mr. Burroughs, p. 62. What is it?

"The uniformity must be co-extensive *with the territory to which it applies.* If a State tax, it must be uniform *all over the State.* If a country or city tax, *throughout the extent of the territory to which it is applicable.....* It must extend to *all property subject to taxation,* so that all

property must be taxed alike,—equally,—which *is* taxing by a uniform rule."

It is to be noticed that the *equality* and *uniformity* are stated to be required *to extend over the territory taxed.* Had the exceptional case of the *three municipalities* now occupying our attention, been under consideration before the Ohio Court, or to the knowledge *as a fact,* of Mr. Burroughs, the Court and the distinguished Commentator, (who is not a mere compiler, but a writer of superior intellectual, prompt and analytical powers, fortified by long experience and judicious observation) would probably have gone on further, in exemplification, and said: "If a tax be levied to pay the separate debts of sub-municipal corporations, of specified and limited territory, consolidated, *after* the incurring of the debts to pay which the tax is to be levied, the tax should be equal and uniform, on their respective territory, and on the property subjected to the tax, the more so, if the Legislature so specially directs.

In his work, Mr. Burroughs declares that all the authorities sustain that doctrine, except a Virginia decision, 13 Gratt., 577. It was surely not to his knowledge, at the time, that the Jurisprudence of Louisiana, in the cases cited, particularly in 2d, 3d, 4th and 11th A. was to the same effect. There is no ruling on this point by the highest Courts of California and Texas, whose Constitution contained and possibly still contains the same words "*throughout the State.*" See also, 13 Ark., 351.

We are not here, to dispute the correctness of the ruling

in other States, whose Constitutions merely provide that taxation shall be *equal and uniform*. The words found in a Constitution, are not to be considered as inserted uselessly or to be meaningless,—but have to be weighed. Hence, the words "*throughout the State*" in ours, then and since, are intended for some purpose, and have a certain meaning which we have previously sought to ascertain and establish. Our Supreme Court has said that "*vi terminis*" the equality and uniformity of a tax, is required as to *State* taxation only, and this declaration QUIETS FOR EVER, all discussion on this subject.

We have already said and we repeat, that had not the municipalities been abolished by Consolidation, and had not their rights and obligations been transferred to, fastened upon, and accepted by the City of New Orleans, we would to-day behold the spectacle of those three municipalities, constituting legally the City of New Orleans, differently administered, differently indebted, and the property within the territory of each, differently taxed, *i. e.* at a rate varying in each. No one, there would be, who would venture to resist the tax so levied, as unconstitutional, because not fixed and imposed at the *same rate*, throughout the several municipalities, or districts, of the City.

But it is besides charged, that the tax is on real estate *alone*, and not on *personal* property, and that this is a discrimination, beneficial in the first instance and injurious in the second case. The authority of the Ohio Court, and the views of Mr. Burroughs are again opposed to us,

fortified, it is believed, by the decision in the case of Gilmore vs. Sheboygan, 2 Black, 510.

In the first place, we are not to be ruled in Louisiana, as to the questions affecting real estate therein, by the laws and jurisprudence of any other Country, within or without the Union. Our Courts may consult them, in the absence of any guide at home, and adopt or reject them, as their sense of justice and duty may inspire and dictate, but in case of any contradiction or want of harmony, the rule is, that they must prefer our laws and jurisprudence.

In the interpretation and application of local laws, local jurisprudence *alone*, carries with it a controlling weight of authority. 13 A. 2; 11 A. 752; 12 L. 546; 1 A. 197; 3 A. 203; 326; 4 A. 145; 14 A. 760; 15 A. 481; 17 A. 301; 19 A. 434; 22 A. 138; 24 A. 253.

R. C. C. 21, 1964, 1965; C. P. 130, 161, 295; 1 A. 138; 2 A. 17; 14 A. 52; 19 A. 234; 21 A. 626; 22 A. 3; 23 A. 503; 24 A. 40; 13 A. 611; 24 A. 217, 11 A. 752.

We have seen what the Ohio decision says and we know what was determined in the Sheboygan case,—which no one ignores.

The subdivision of the State into counties, cities and towns is a question of policy, to be determined by the Legislature. The subdivisions are under the control of the Legislature, due regard being had to the vested rights of third parties.

"The power of apportioning taxation, of designating

the objects, persons, *localities* subject to the burden to be imposed, is equally unlimited."

It has been held, in this State, that the Legislature had the power to divide the city, so as to embrace *urban* property, within different limits, and to declare the remainder, *rural* property and that the rate of taxation could be different, in the one, from what it was in the other—N. O. vs. Philippi, 9 A. 45; 10 A. 763. See Act 18 March, 1850. Such division is susceptible of repeal. 10 A. 454, 730, 764.

For such reasons, the Legislature had a right to divide the city, as organized and existing, under the Act of 1805, and subsequent amending statutes into municipalities and had a right to do away with that division, by consolidating the subdivisions—without prejudice to the right of third persons. 1 A. 162; 5 A. 664, authorities already given.

In the case of City vs. Cazelar, 27 A. 115, the Court held that property, not *urban* and manifestly *rural*, could be legally subjected, on its assessment, to the same percentage, tax or rate of taxation, as was placed on *urban* property.

In the case of Layton vs. New Orleans, 12 A., 515, the right of the Legislature and City, to tax an added district, so as to subject it to the payment of the debt previously incurred by the other districts, was recognized as constitutional and enforced.

It is elementary that the power of taxation is an incident of sovereignty and essential to the existence of the government, which, itself is indispensably necessary for

the protection and welfare of persons and the enjoyment of property, and must be thereby supported. It is lodged there and can be exercised to any extent, except so far as restricted by the organic law. It is no doubt lamentable that some fair limitation has not been placed on the exercise of that dreadful prerogative in this State, for, had such been the case, the vampires who for a long while have ruled this State in all its departments, would not have drained its Treasury, exhausted its revenues, pledged, dishonored and ruined its credit and left its inhabitants almost lifeless, in a condition bordering on misery and desolation, with hardly any hope for an early recovery. "What an immensity of extravagance, corruption, wastefulness, unnecessary and grievously burdensome taxation, bankruptcy, moral and financial ruin, might have been spared to the people of Louisiana"!! A step has been taken in that direction by limiting the amount of indebtedness of the State and of its Capital, but the amount of expenditures, in neither case, has been fixed by the Constitution; so that, the power of taxation is still uncontrolled and the State may tax at pleasure, and where, by legislative enactment, some limitation has been put upon municipal corporations, the restraint can at any time be removed and the power exercised as injuriously as in the past.

That power of taxation, or rather *contribution*, it is well settled, the State can by its Legislature, delegate to the extent that it pleases, to such political corporations as it may have organized as its functionaries; but this trans-

mission takes place only, so far as the Constitution does not forbid. A State may, however, delegate to such corporations partial powers only, and can restrict its exercise to certain classes of property or of persons. Strictly speaking, the power of taxation is not transmissible. The power which can be delegated, is one to raise contributions, as already said.

Cooley, on Tax, Chapter 1st.

Burroughs, on Tax, Chapter 1st.

Dillon, on Municipal Corporations, Chapter XIX.

Municipal Corporations have no right to tax, unless that power has been delegated by the State. Where the delegation is mandatory, the power must be exercised, where it is merely directory or optional, it may or not be exercised, according, as in its discretion, the Municipal Corporation may deem best advisable.

By the Charter of 1805, the City of New Orleans, which it created, was clothed with the power of taxation of real estate and personal property, *as it might deem proper*. When the City was divided into Municipalities, they were also clothed with the power of taxation. When these were consolidated, all their rights and powers were transferred to, and their obligations were fastened upon, the City of New Orleans, provision being specially made by section 37, for the extinguishment of their indebtedness.

By that section it was provided that Bonds would be issued by the City, in exchange of the evidences of debts held by creditors of the Municipalities; that annually, in

January, a special tax of $650,000 should be raised by the Council, on real estate, and that the proceeds applied to the payment of the Coupons, and what surplus would remain, to the extinguishment in part, of the Bonds, though unmatured. The tax was to be assessed on the real estate, in each municipality, in proportion to the indebtedness of each, and according to a previous assessment.

In the case of Municipality vs. Duncan, 2 A., 183, in which the objection was made that the tax was levied on real estate *only*, the Court said "It does not appear to us "that the power given to tax real estate and personal "property, render it *imperative* on the Corporation to tax "BOTH."

In the succession of Poydras, O. B. 22, p. 592, the Court said: (9 A., 165.)

"To be uniform, taxation need not to be universal. Certain objects may be made its subjects, and others may be exempted from its operation. Certain occupations may be taxed for a greater amount, and others for a less, but as between the subjects of taxation, in the same class, there must be equality."

The real estate, in each municipality, constituted a class, and was equally and uniformly taxed for past indebtedness.

10 A. 400, State vs. Lothrop; 26, 402, State vs. Ogden.

The legislative right to delegate the power of taxation for local purposes to municipal authorities, is established in this and our sister States by an uninterrupted train of

legislative precedents and judicial adjudications. The necessity and propriety of such delegation are obvious. The supreme jurisdiction has not leisure, nor information to manage the concerns of a particular locality, whose interests, best understood, can be best administered by its inhabitants or the legally selected persons of their choice.

8 A. 341, 362; 13 A. 56; 25 A. 433; 26 A. 151, 674; 25 A. 156.

Those authorities show besides, that a municipal corporation can exercise the power of taxation, *only* as far as, and in the mode, conferred by the law making power.

The discretionary power which was originally (1805) given, and which was subsequently (1836) transferred to the municipalities, to tax real estate and personal property as might be deemed proper, was delegated to the city by the Act of 1852, and besides was restricted by Section 37 to the real estate only, in each municipality to pay the indebtedness of each. The State had a right to do so, and the city could not tax for that purpose, any other property; the less so, as from 1805 to 1852, personal property had never been taxed. It took a special statute to be passed in 1850, p. 5, to authorize the taxing of capital; but this act was formally repealed in 1852, No. 30, (p. 20,)—previous to the Consolidation Act, No. 71.

It will be noticed and this remark is significant, that Art. 127, of the Constitution of 1845, in force, when the City Consolidation Act was passed, also contains the following provision:

"AFTER THE YEAR 1848, all property, *on which taxes may*

be levied, shall be taxed in proportion to its *value*, to be ascertained as directed by law."

The article does not subject *all* property to taxation, but merely directs that property *on which taxes may be levied*, shall be taxed equally and uniformly according to its value ascertained as the law may direct. The jurisprudence permitting one kind of property to be taxed higher than another, allowing classification, is not to be denied. 25 A. 568; 23 A. 726; 21 A. 434; 14 A. 434; 11 A. 929; 10 A. 398, 736; 9 A. 165.

The decision in the case of Sheboygan, 2 Black, 510, was made in the U. S. Supreme Court, upon the *adjudications*, of the Supreme Court of the State, construing its constitutional provision, relative to *equality* and *uniformity*, without the qualification "*throughout the State*" found in ours. The Constitution of that State required *all* property, for whatever purposes, to be taxed equally and uniformly.

The objection is untenable that the tax is illegal also, because it is to be assessed according to the previous assessment of 1851, of property, in each municipality.

The future imposition and collection of taxes, according to a past assessment is within the legislative power. 10 A. 745; 13 A. 268, 676.

The ruling in 6 A. 605, declaring the levy of a tax by the city, on a previous assessment illegal, was made, because the city did so, without legislative sanction.

The beauty of the stand, legal and moral, taken *by the defense is:* that, while it is charged in the performance of

a *sacred duty*, that the consolidated debt has no legal existence, or is of more than doubtful legality, the Consolidated Bonds are considered by the city authorities *as funded*, though there be but two stolen ones to be found in the "Refugium Peccatorum;" a tax of at least **$450,000** is levied, and whatever *premiums* are drawn by the Consolidated *unfunded* Bonds, are received by the city and applied as the municipal authorities deem advisable. So that, while on the one hand, the debt is denied, on the other, it is treated as in existence and valid, to enable the drawing and using of premiums!!

VII.

The objection of one of the Intervenors, is groundless, that the *mandamus* cannot issue, except for the years relative to which, the Council was put in default. Where a party is bound to perform an act at a given time, no default is necessary. At any rate, we have proved two "defaults."

It must not be forgotten that the Relator has not only prayed for a *mandamus* but also for an *injunction*. A proper allegation to justify the allowance of that remedy is made in the petition. The Relator avers that the tax required by Section 37 has not been levied, although the Council was twice duly put in mind of its duty; that the real estate upon which the tax claimed should have been, *but was not levied*, has been burdened with other taxation, for purposes other than that of paying the Consolidated Coupons and Bonds, as required by Section 37,

and the taxes raised, from the real estate subject to the Consolidated Tax, will be *diverted*, unless an injunction issue. The law declares that "*all ordinances, resolutions or other acts passed by the Council after the first of January in each year, shall be null and void, unless the ordinances imposing the Consolidation Loan Tax, shall have been previously passed.*

The real estate, subject to taxation, in favor of the Consolidated Debt, was overwhelmed, under apparent sanction of law, by such excessive and exorbitant taxation, that property holders found themselves unable to bear the additional burden, and the consequence has been even in the later days, when the special tax was still imposed, that tax payers have, in almost innumerable instances, suspended payment, and the tax intended to be raised for the Consolidated Debt, has not been met and satisfied, and a debt which, thought in reality, the best secured, has remained dishonored, and the wholesome restrictions, forming part of the contract, relative to the issue of said Consolidated Bonds, and which were designed for the protection of the tax payers and citizens generally, has fallen in contempt, and the real estate within City limits, has lamentably sunk in value, to the great injury of both; tax payers and holders of said Consolidated Bonds.

If Section 37 be a valid law, the failure of the Council to impose the consolidated tax, the levy of another tax on the real estate subject to that tax, the collection and application of that tax to purposes other than the

Consolidated Debt, has worked and will work irreparable injury to the Relator and to the other Bondholders, similarly interested. Hence, the necessity of the conservatory writ asked, to prevent a diversion or perversion of the tax raised on the real estate, subjected by law to the payment of the Consolidated Tax.

The authorities applicable to such a case are so abundant and familiar to every one who has any knowledge of conservatory proceedings, that it is deemed unnecessary to occupy any further time in quoting them.

These remarks need not be carried further. The subject has been so fully exhausted, and the defense so completely annihilated, by my very eminent colleague the Hon. JOHN A. CAMPBELL, that I must here close. However incomplete the foregoing work, hastily prepared may be, the Relator respectfully and confidently submits that the application for a peremptory *mandamus* should be allowed and that the *injunction* sought, should be granted and perpetuated, the whole as prayed for in the petition

Very Respectfully Submitted,

E. BERMUDEZ.

Of Counsel.